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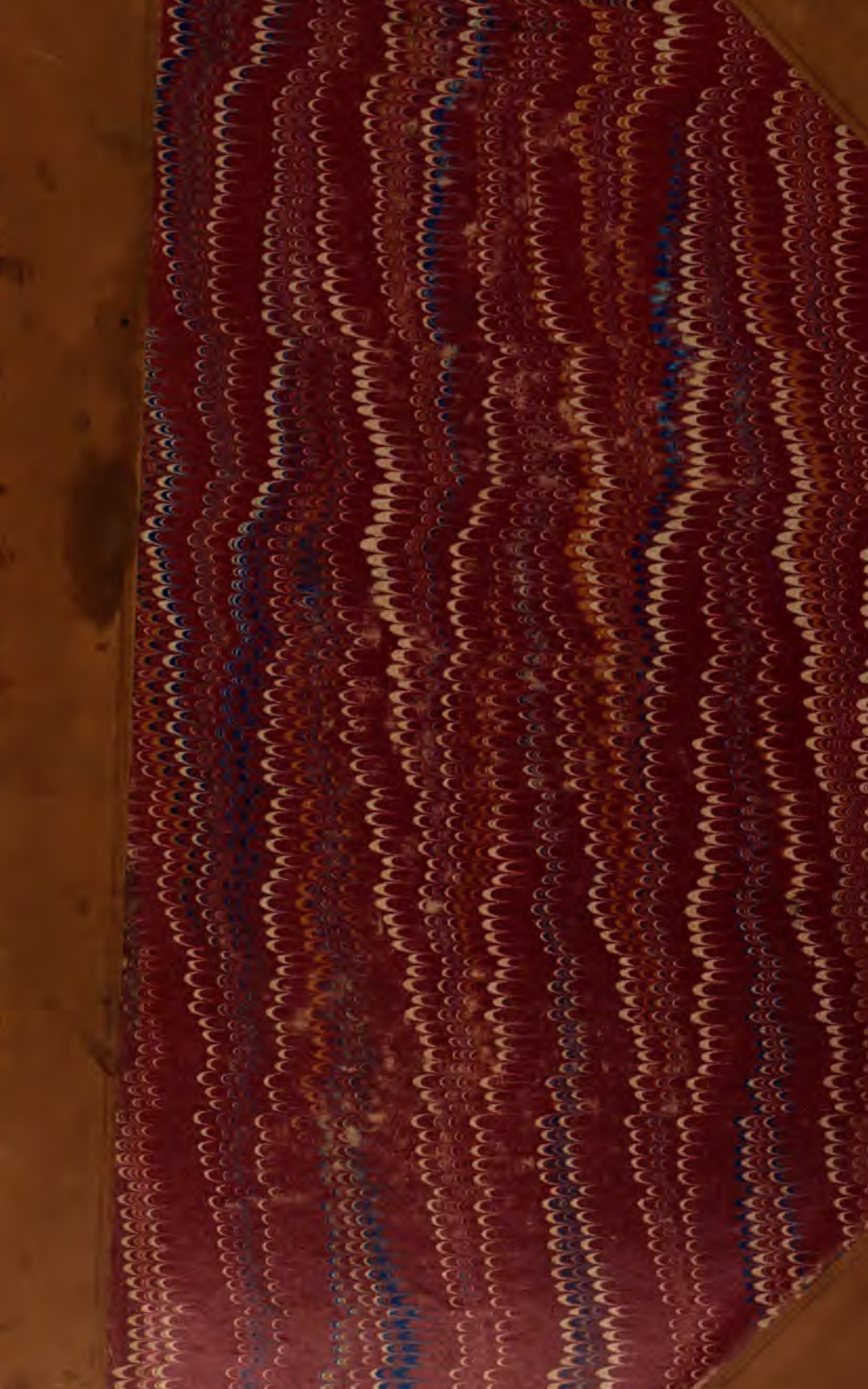
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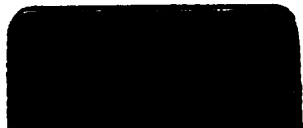
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REPORTS

OF

CASES

2134

ARGUED AND DETERMINED

IN THE COURTS OF KING'S BENCH

AND

IN THE PROVINCIAL COURT OF APPEALS
OF LOWER CANADA.

WITH

A FEW OF THE MORE IMPORTANT CASES IN THE COURT OF
VICE ADMIRALTY

AND

ON APPEALS FROM LOWER CANADA

BEFORE

THE LORDS OF THE PRIVY COUNCIL;

COLLECTED BY

GEORGE OKILL STUART, ESQ.

BARRISTER AT LAW.

QUEREC:

PRINTED BY NEILSON & COWAN.

1834.



P R E F A C E.

IN the absence of any regular reports of the decisions of the superior courts of this country, persons entering upon the practice of the law find it a matter of much difficulty to make themselves acquainted with many of *these* decisions, settling important principles of law. The dangers to which parties must every where be subjected from the want of reports of judicial decisions, are peculiarly aggravated under a system derived from such various sources as is the law of Lower Canada. Feeling this inconvenience, I was early induced to direct my attention to the collection of the more important cases, and as they increased in number, I was led to believe that the publication of them might not be without use to the profession. I was encouraged to publish them by several of my friends in the profession, and was further induced to make the attempt by the offer which the Honorable the Chief Justice of the Province, MR. SEWELL, was pleased to make, in the most obliging manner, to afford me access to his original minutes. With this aid, and with the cordial co-operation of several members of the profession, I trust, that it will be found that the judgments are reported with strict accuracy as to the chief grounds and substance of them.

Much will, doubtless, yet remain to be done ; but if the present humble effort serve only to mitigate the evils incident to the absence of regular reports, and to hasten the period of their publication, I shall not regret the time and labor bestowed upon the present collection.

Quebec, 16th October, 1834.

LIEUTANT OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT

58,790

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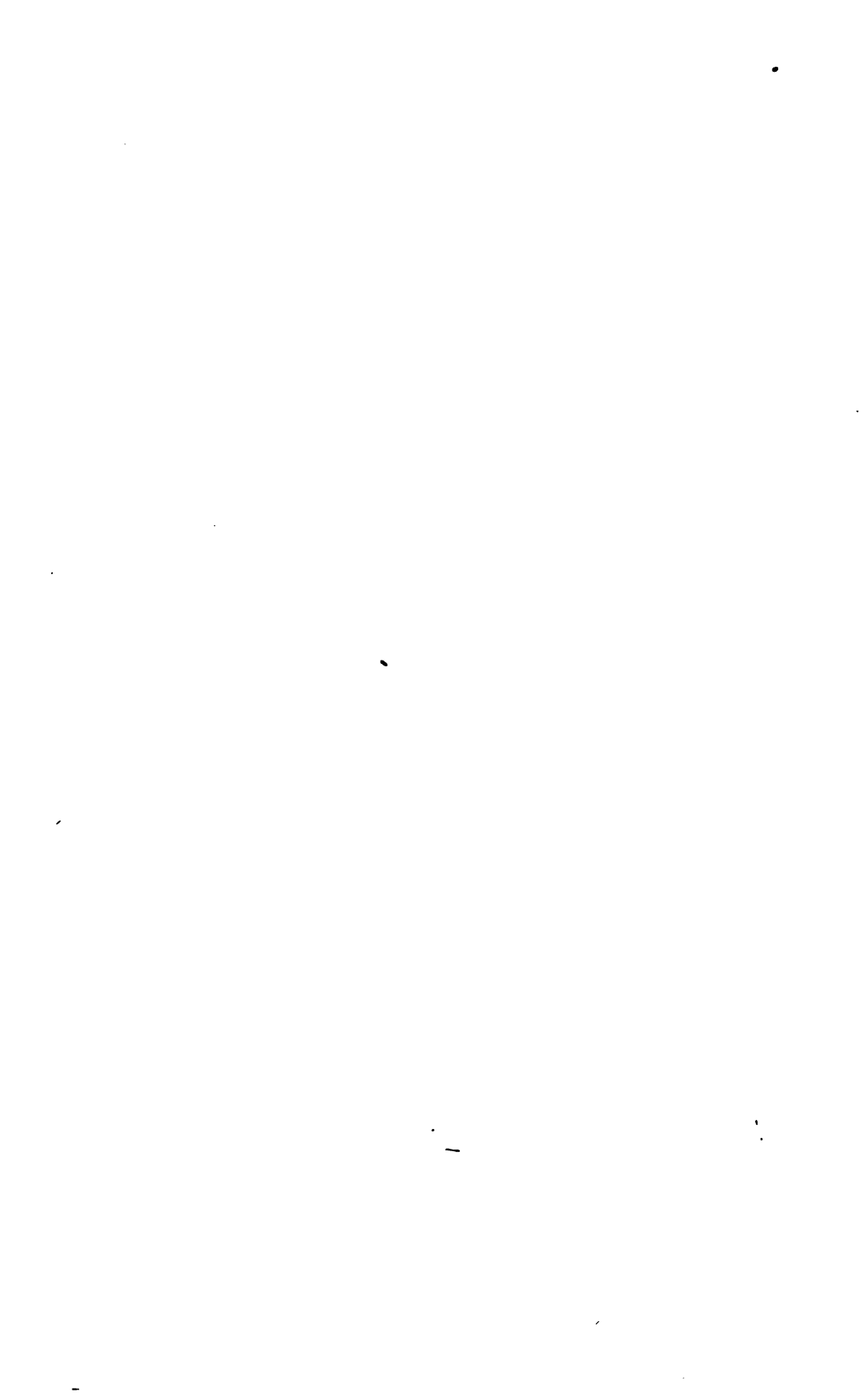
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CASES

ARGUED AND DETERMINED

IN

THE COURT OF KING'S BENCH

FOR THE

DISTRICT OF QUEBEC.

IN THE CASE OF PIERRE BEDARD.

THIS day, *A. Stuart* moved for a Writ of *Habeas Corpus*, directed to the Keeper of the Common Gaol of the District of Quebec, to produce the body of Pierre Bedard, returnable within fourteen days, and filed the following Documents in support of his application :—

1st. A notice of Motion to the Attorney General, dated the day previous.

2nd. The following certified copy of Commitment :—

Province of Lower Canada to Wit.

To the Keeper of the Common Gaol of Quebec.

Whereas Pierre Bedard, of Quebec, Barrister at Law, stands charged before us upon oath, with treason-

17th April,
1810.

On a motion for a Writ of Habeas Corpus to produce the body of a person in custody, (under a Warrant from three Members of the Executive Council for "treasonable practices,") founded upon his "privilege" as a Member of the Provincial Parliament, two papers purporting to be two Indentures of Elec-

tion produced in support of the motion, are not sufficient evidence of his being such Member, to entitle him to the benefit of the Writ.

A Member of the Provincial Parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices," and during his confinement elected a Member of a new Parliament, is not entitled to privilege from such arrest, by reason of his election to either Parliament.

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able practices, these are, therefore, in His Majesty's name, to require and command you to receive the body of the said Pierre Bedard into your custody in the Common Gaol of this District, and him safely there to keep and detain until he shall thence be delivered in due course of law.

GIVEN under the Hands and Seals of us, THOMAS DUNN, FRANÇOIS BABY and JOHN YOUNG, three of His Majesty's Executive Council, of and for the said Province, at the City of Quebec, in the said Province, this 19th day of March, 1810, in the 50th year of His Majesty's reign.

(Signed) "THOS. DUNN," "F. BABY," "JOHN YOUNG."

(A true Copy.) (Signed) WILLIAM REID, Keeper.

3rd. The Quebec Gazette containing the prorogation of the Provincial Parliament by His Excellency Sir *James Henry Craig* then Governor-in-Chief, &c., on Monday the 26th February, 1810.

4th. The Quebec Gazette containing Proclamation, dated 1st March, 1810, dissolving the Provincial Parliament and calling a new Parliament, Writs to bear test the 12th March, 1810, and to be returnable on Saturday the 21st day of April following, for every place but Gaspé.

5th. An Indenture, dated 25th October, 1809, by which it appeared that Pierre Bedard was returned as Member of the Provincial Parliament for the Lower Town of Quebec.

6th. An Indenture, dated March 27th, 1810, by which it appeared that the said Pierre Bedard was returned as a Member for the County of Surrey.

A. Stuart [in support of the Motion] said, that this application was grounded upon the proviso of the Provincial Act 43, Geo. III. c. 1, s. 6., which provides " That nothing in that Act should extend, or be construed to extend, to invalidate or restrain the lawful rights and privileges of either branch of the Provincial Parliament in this Province," and that the question submitted to the Court was, whether this proviso embraced the present case? and whether it does not destroy the force of the 4th clause, which enacts " That such Writ of Habeas Corpus, or the benefit thereof, shall not be allowed by such Court or Courts, Judge or Judges, to any person or persons detained in prison, at the time of his, her, or their application for such Writ of Habeas Corpus, by such Warrant of His said Majesty's Executive Council as aforesaid, for such Causes as aforesaid, or any or either of them; and that in all and every case, where such Writ of Habeas Corpus shall be allowed, no Court or Courts, Judge or Judges, shall bail or admit to bail, the person or persons to whom such Writ of Habeas Corpus shall be allowed, if upon the return made to such Writ of Habeas Corpus at the expiration of fourteen days, from the day on which such Writ of Habeas Corpus shall be so allowed, it shall appear that such person or persons shall be then detained in prison, by such Warrant of His said Majesty's Executive Council, as aforesaid, for such causes as aforesaid, or any or either of them, any Law, Statute, Act or Ordinance to the contrary notwithstanding." (a)

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(a) The provisions of this Act, which was intituled " An Act for the better preservation of His Majesty's Government as by law happily established in this Province," are in substance as follows :—

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The House of Assembly must, of necessity, have those privileges which are essential to its very existence. To ascertain what those privileges are, we must look to the House of Commons in England, where the applicant would undoubtedly have been entitled to his privilege. Parliamentary privilege, as to the freedom from arrest, not only exists during the actual sitting of Parliament, but extends to forty days after a dissolution. There are but three Cases to which it does not extend, *Treason*, *Felony*, and an *actual breach of the peace*. The charge against the applicant comes under neither of these descriptions. "*Treasonable practices*" are not *treason*: they possess, indeed, some of the qualities of treason, but are entirely destitute of other essential qualities necessary to constitute treason. As for example, in the case of Sydney, among whose private papers were found some

The 1st Clause, after declaring that it was necessary to defend and secure His Majesty's good and loyal subjects within this Province against every traitorous attempt that might be formed for subverting the existing laws and constitution of the said Province, and for introducing the horrible system of anarchy and confusion which had so fatally prevailed in France, for the better preservation of His Majesty's Government, and for securing the peace, the constitution, laws and liberties of the said Province, enacts, "That persons committed by the Executive Council, for high treason, misprision of high treason, suspicion of high treason, or treasonable practices, might be detained in custody, without bail or mainprize, during the continuance of the Act, nor should be bailed by any Court, &c. without a Warrant from the Executive Council.


The 2nd Clause enacted, that it should not be lawful for any Justice of the Peace to admit any person to bail for the above named offences during the continuance of the Act.

The 3rd Clause enacted, that during the continuance of the Act, in cases where persons were charged with the offences above named, and to whom a Writ of Habeas Corpus had been allowed, the same should not be returnable in less than fourteen days, and that as soon as the application was made for the Writ in any case, it became the duty of the Court to give notice, &c. of the same in writing, to the Governor.

The 5th Clause limits the duration of the Act, and provides, that after its expiration, every person so committed, shall have the benefit and advantage of the laws relating to, or providing for the liberty of the subject in this Province.

writings of a treasonable tendency ; but they had neither been published, nor did any intention of publishing them appear. So also, in the case of a person *preparing* to make communications to the King's enemies, without having taken any steps to carry his intention into effect. In both cases will be found "*treasonable practices*," but in both, the *overt Act*, absolutely essential to constitute treason, is wanting. "*Treasonable practices*" are certainly not *Felony*, nor do they amount to an *actual breach of the peace*. This is a commitment for "*treasonable practices*," and commitments must at all times be construed strictly. The offence cannot be *constructive*, it must be an *actual* breach of the peace. The charge, therefore, not coming under any of the three exceptions, the applicant ought not to be barred of his privilege. The case of *Wilkes* is in point, who was arrested for having published an infamous and seditious libel. (a) He was brought before the Court of Common Pleas by a Writ of Habeas Corpus, and claimed the privilege of Parliament : Lord Chief Justice *Pratte* (afterwards Earl *Camden*) was of opinion that he was entitled to his discharge, and discharged him. Upon the point of privilege, the applicant claims as well upon the ground of having been a Member of the late, as of having been elected a Member of the new Parliament. (b)

The Attorney General, (Uniacke,) contra. Before the Counsel for the applicant can avail himself of the

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(a) 2 Wils. 151.

(b) *Holiday & al. v. Colonel Pitt* (*Strange*, 985.) was cited to prove that the privilege of Parliament extends to a certain period after a dissolution.

Also 1 Siderfin 42. 1 Hatsell's Precedents 163 ; and Bacon, under the word privilege, to shew that a person already in custody is entitled to claim his privilege as soon as he is elected.

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argument he has made use of, he must distinctly establish what are the privileges of the Members of the House of Assembly of Lower Canada. The present question is, whether an express Act of Parliament is to be evaded by extending to the Members of the Provincial Parliament, *all* the privileges of the Members of the Imperial Parliament? This cannot be the case; because it is no where to be found that such privileges have been extended to them:—nor have any such been given to them by the Constitutional Act. Every traitorous attempt is treason; nor is it necessary that treasonable designs should be ripe for execution, and have actually commenced their operation, to bring them under the denomination of treason; nor does privilege any more extend to treasonable practices than to treason itself. The argument founded upon the case of *Wilkes* must fall to the ground. For the House of Commons solemnly disavowed the decision of the Court of Common Pleas in the very same year in which it had been made (1763); and the House of Peers, five days subsequent to the resolve of the Commons, passed a similar resolution. Of late years the privileges of the House of Commons have been much curtailed, and if the question before the Court were now raised in England, the applicant would, most certainly, not be allowed his privilege. (a) Indeed there is no instance of a Member being allowed privilege in a criminal case, neither is the charge against the applicant for a *supposed* or *constructive* offence. The Warrant of Commitment shews it to be a charge of “treasonable practices” *upon oath*, and this charge

(a) 1 Hatsell, 200. and 5. Bacon 631—No. 4.

unquestionably includes a breach of the peace. It would surely be absurd to say, that in the case of a common assault upon an individual, a Member of the Legislature shall not be privileged, and yet,—that on a charge of “treasonable practices,” affecting the welfare and tranquillity of the whole population of a country, he may claim and have his privilege. The obvious intent of the privilege of Parliament is to protect a Member from the sufferance of wrong, not to enable him with impunity to commit wrong; “it must not be used for damage to the Common Wealth.”

The Advocate General, (Perrault,) on the same side. This question is not without difficulty. By the 4th Clause of the Statute 43, Geo. III. c. 1. all persons, accused of certain offences therein specified, are divested of the right to sue out a Writ of Habeas Corpus. The Counsel on the opposite side has fallen into an error in the application of the two authorities he has cited. The decision of the Court of Common Pleas, in the case of *Wilkes*, was against every principle of law, (a) and was formally disclaimed by the British Parliament. The privilege of Parliament extends only to civil cases; there exists no precedent of the extension of it to indictable offences, of which description is the offence the applicant is charged with. The spreading false and malicious reports against the Government must be considered as a breach of the peace. The writing and publishing seditious libels, also, is an offence not entitled to privilege, which is taken away in all criminal cases. The case of *Holiday v. Pitt*, was entirely a civil case, and therefore not applicable to the

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(a) 1 Black. Com. 165-166 and 4. 149.

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present question. The Warrant of Commitment is sufficient proof that the offence with which the applicant is charged is an indictable offence, and is, therefore, sufficient ground for the Court to reject the present application for a Writ of Habeas Corpus.

Bowen, on the same side. Should the argument in support of the motion be admitted, the House of Assembly might be composed of fifty traitors, and no remedy be had against them ; it would be to say, that under the shield of privilege, might be found protection and security from the consequences of criminality. But before entering into the consideration of "*what may be the privileges of the Provincial Parliament,*" let us examine whether the applicant, at the time of his arrest, could be considered as a Member of that Parliament, or was entitled to claim any lawful privilege that may attach to that character. For this purpose it is necessary to advert to dates. The prorogation of the Provincial Parliament took place on Monday, February 26th, 1810. The Proclamation, dissolving the House of Assembly, issued on Thursday, 1st of March. The Writs for a new Election bear teste on Monday, March 12th. The arrest of the applicant was on *Monday, March 19th*, and he is said to have been elected one of the Members for the County of Surrey, on Tuesday, March 27th. It is very material to keep these dates in view, for the principles of this application are, that the applicant is entitled to obtain his Writ on two grounds. 1. As having been a Member of the *late* Provincial House of Assembly. 2. As having been elected a Member of the *new* Provincial House of Assembly. And, as such, entitled to his privilege. He ought not to succeed on

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the first ground, because, if we refer to English authorities, it will be found that the period after a session, during which a Member of Parliament is privileged, for the purpose of his return home from the performance of his public duty, is a *reasonable time* for that purpose, and not, as has been argued, *forty days*. And this was decided in the case of *Martin*. (a) The case cited of *Holiday v. Pitt*, only shews that the Members had privilege, after a prorogation or dissolution, so long as they were paid, that is to say, till they reached their own houses. Eighteen days had elapsed between the dissolution of the late Parliament, and the arrest of the applicant ; and can it be seriously argued that this was not a reasonable and sufficient time for him to go from the House of Assembly to his own house, when both are in the same city ? If he could have claimed any privilege, therefore, it could only have been the privilege of a single day.—He must fail on the second ground also, because, at the time of his arrest, he was not a Member of any Parliament ; and, consequently, the 4th Clause of the Provincial Act, cited by the Counsel for the applicant in opening his case, is in full force and effect, and is a perfect bar to his claim of those privileges referred to in the proviso, be they what they may. The case of *Wilkes* has been cited to shew, that as the applicant has been elected, since his confinement, a Member of the new Parliament, he is entitled to privilege. But the decision of the Court, in that case, has long ceased to be recognized as law ; and was set aside by the Parliament itself. The privilege of a Member of the House of Commons

(a) See *Martin's case* in 1586.

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commences only at his election ; “ but if he be arrested, or taken in execution, before his election, he shall not have privilege.” (a) But, even here, the reference is only to civil suits : how then can it be contended that privilege exists, previous to election, in criminal cases ? In England Members of Parliament are privileged from arrest in all cases, *treason, felony, or breach of the peace* only excepted. (b) The 6th Clause of the Statute 48, Geo. III. c. 1, says, that “ nothing in this “ Act shall invalidate or restrain the lawful rights and “ privileges of either branch of the Provincial Parliament ;” and the question necessarily arises, What are the lawful rights and privileges of the third branch of the Legislature of Lower Canada ?—Are they, in every respect, the same with those immemorially enjoyed by the House of Commons in England ?—Most assuredly not. Where then shall we find them enumerated, or by what means can we trace them out ? The Act of the 31st Geo. III. c. 37, by which the Legislature of Lower Canada was created, and by which our constitution is given to us, defines and limits that constitution. Will the Court admit that the Provincial Legislature is entitled, under that Act, to all the privileges of the Imperial Parliament ? It is impossible. A Member of the Provincial House of Assembly can claim no privileges, but such as are there given him. In that statute is comprised our whole constitution ; that statute forms our only charter.

A. Stuart, in reply.

When I first made this application to the Court, I was under a strong impression that, in point of law, it

(a) 5. Bacon 631.

(b) 4. Ins. 25.

ought to be granted : and this impression has been matured to perfect conviction by the arguments adduced by the Counsel who have opposed the motion. They have founded their arguments on an assertion the most questionable. They deny that the House of Assembly has any privileges whatever ; although those privileges have been constantly claimed and recognized,—are inherent in every Legislative body,—and are essential to its very existence. But it is said that they are neither mentioned, or defined, in the Act of the 31st of the King. I know no reason why a more strict rule of construction should be applied to this statute than to any other ;—but I can conceive many strong ones why it should receive a more liberal construction than an Act which, perhaps, solely relates to and regulates mere private rights. It follows, *d foriori*, that the British Parliament, in granting to this country a Provincial Legislature, granted also those necessary privileges without which that Legislature could have no political existence. It would be difficult, and Sir *William Blackstone* thought it would be inexpedient, to define with accuracy the extent of Parliamentary privilege. The privileges of the Imperial Parliament are not fixed by, nor to be found in any statute. The authorities, cited by the Attorney General from *Hatsell*, prove, what I have urged, the necessity of Members of Parliament being free to proceed to the performance of their public duties. If it were true that the House of Assembly have no privileges, it would be in the power of the other branches of the Legislature to annihilate it. And, if it have privileges, from whence can we derive so correct information of their nature and extent, as from the British

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House of Commons itself? But it has been said that, in England, a Member of the House of Commons, confined upon a charge of treasonable practices would not be entitled to privilege. The *dictum* of Sir *William Blackstone*, cited in support of this assertion, is contradicted by the decision of the Court of Common Pleas in *Wilkes's* case, and by the law authorities referred to by Chief Justice *Pratte*. The Resolutions of the two Houses of Parliament, consequent upon this decision, were passed in times not the most calm; and are not entitled to carry the same weight with them, that the decision of Chief Justice *Pratte* carries. "Treasonable practices" may exist, and yet the party not be guilty of an indictable offence. If the principle be admitted—that privilege never extends to any case of a criminal nature, why are treason, felony, and breach of the peace *alone* specifically excepted? If the Provincial Act of the 43rd of the King is to be construed in the manner contended for by the Counsel for the Crown, the proviso is altogether nugatory. The case of *Martin* has been cited, to shew that privilege extended to a reasonable time only, after a prorogation. In that very instance, twenty days were considered to be a reasonable time: yet it is cited as an authority to shew that eighteen days are more than a reasonable time. The case of *Pitt* incontrovertibly establishes that the privilege of Parliament extends as well to a certain period after a dissolution, as after a prorogation. I will conclude with repeating my former observation, that, in the present case, privilege is claimed upon the double principle of the applicant having been elected, and being at the present moment, a Member of the new Provincial Parliament as well as

that he was a Member of the late Provincial Parliament.

Per Curiam.

SEWELL, CH. J. We are fully satisfied that the motion cannot be granted. The facts which constitute the case before us are few in number. The late Provincial Parliament was dissolved by Proclamation on the first of March last, and, by the same Proclamation a new Parliament was summoned to meet on the 21st of April. On the 19th of March Mr. *Bedard* was arrested, and committed to the common gaol of this District, by a Warrant under the hands and seals of three Members of the Executive Council, for "treasonable practices," and the object of the motion before us, is to release him from confinement upon the grounds that he served in the last Parliament as a representative of the City of Quebec. That on the 27th of this present month, he was elected to serve in the same capacity for the County of Surrey in the new Parliament, and therefore that he is entitled to his discharge, by reason of his privilege as a Member of the House of Assembly. The commitment of Mr. *Bedard* is made under the authority of the *Provincial Statute* 43rd Geo. III. c. 1. which authorizes the detention of every person committed by Warrant, signed by three of the Executive Council, for High Treason, Misprision of High Treason, or "treasonable practices," without bail or mainprize, during the continuance of the Act. It is, however, provided by the sixth Clause of this Statute, "That nothing in the Act contained shall extend, or be construed to extend, to invalidate or restrain the lawful rights and privileges of either branch of the Provincial Parlia-

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"ment ;" and it is contended that Mr. *Bedard* is within the letter of this exemption. But to bring this case within this proviso, it is obvious, that in the first instance he must be proved to be a Member of the Legislative Council, or of the House of Assembly ; and, in point of fact, there is no evidence of either. We have nothing, indeed, before us but two papers, which we are told are Indentures, executed between Mr. Bedard and the Electors of the City of Quebec, and of the County of Surrey. I say "told," because of this assertion no proof whatever has been offered, nor is any thing adduced, from which the authenticity of these papers can in any way be inferred. In the case of *John Wilkes* there was a formal admission (a) on the part of the King's serjeants, that he was a Member of the House of Commons ; and, upon that admission the proceedings of the Court of Common Pleas were founded. In this case there is no such admission, and as there is a total absence of every thing which, by law, we are permitted to receive as evidence of the fact upon which this claim of exemption is entirely built, we must necessarily, for this defect alone, reject the motion. I should be sorry, however, to have it supposed that this Court concedes what has been argued, viz., "That there is privilege of Parliament against arrest for treasonable practices," or to have it believed that we should hold ourselves bound by law, in any future instance, to admit a claim of privilege against arrest under circumstances similar to the present. The circumstances to which I allude, (assuming all facts to be as they have been stated,) are

(a) 2. Wilson 151.

the arrest of Mr. *Bedard* eighteen days after the dissolution of the last Parliament and his Election to the new Parliament during his confinement. If Mr. *Bedard* was entitled to privilege upon the day of his arrest, (the 19th of March,) it is evident, (as he was not elected for the County of Surrey until the 27th day of March,) that his right to it must be solely founded on the fact of his having been a Member of the last House of Assembly; and if he was not entitled to privilege upon the day of his arrest, then, it is equally evident, that his claim to privilege must be entirely founded upon his election to the new Parliament. In England, the privilege from arrest is claimed and allowed to every Member of the House of Commons, "*veniendo, morando, et exinde ad propria redeundo*," (a) and extends to forty days after every prorogation, and to forty days before the next appointed meeting. (b) But although, to the effect which has been stated, there are several legal decisions, yet it does not appear that any precise period, for the duration of this privilege after a dissolution, has been fixed. *Prynne* is of opinion, that it continues for the number of days during which (after a dissolution) a Member formerly received wages; (c) and those wages were in proportion to the distance between his residence and the place where the Parliament was held. (d) Upon this principle, in the case of *Holiday v. Pitt*, (e) which has been cited at the bar, it was held by all the Judges that this privilege extends only to a *convenient* time after a *dissolution*, that is, to a sufficient time to enable the Member, with

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(a) 4. Ins. 46. folio edition.

(b) 2. Lev. 72.

(c) 4. Parl. Writs. 68.

(d) Stat. 35. Hen. 8. c. 11.

(e) Strange 985, and Fort. 159.

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convenience, to return home. Now, the last Provincial Parliament met in Quebec, in the very place for which Mr. *Bedard* was returned a Member, and in which he resides ; and as, therefore, it is impossible to say that he had not a convenient time for his return home, for transporting himself from one, to another, part of Quebec, between the first and the nineteenth day of March, it is clear that the day on which he was arrested was not within the period to which the privilege of the last Parliament extended.

Let us now examine whether this claim can be supported under the privilege of the new Parliament. There is certainly a material difference between the election of an individual who is at large, and the election of one already in confinement, which is the present case. In the former instance, the electors, having chosen a free-man, are without blame, and ought not to be deprived of his services by any act of his, to which the privilege of Parliament extends ; in the latter they make choice of one who visibly is not in a situation to perform the services which they require of him, and they have, therefore, only themselves to blame if they are deprived of them. In England, again, upon these principles, it has been decided that the privilege of a Member of the House of Commons from arrest, commences at his election, (a) unless he has been arrested, or be in execution before his election, in which case it has also been decided, that he is not entitled to privilege. (b) Freedom from arrest, in all cases to which privilege legally extends, may be considered to be as indispensably necessary to the existence of a

(a) 4. Bacon, fol. ed. 233.

(b) 2. Siderfin 42. R. in Parl. 12th March, 1592.

Provincial House of Assembly, as to an English House of Commons. But there is no principle upon which it should be admitted in this Province, under circumstances which are held in England to be such as must exclude it. It is argued that "there is privilege of Parliament from arrest for treasonable practices," and to support this assertion it is contended that this privilege extends to all offences except treason, felony and breach of the peace, (which may be admitted) and that treasonable practices do not amount either to treason, to felony, or to breach of the peace. The Court is of opinion that "*treasonable practices*" are within the meaning of the words "*breach of the peace*," and that the privilege from arrest does not extend to cases of this description. All indictable crimes (and all treasonable practices must be indictable) are held in law to be *contra pacem domini regis* ; and upon this ground, in England, it is now understood that the claim of privilege does not comprehend the case of any indictable crime. Such being the opinion of the Court, we are not called upon to make any enquiry as to the distinction between treason and treasonable practices. It may be well, however, to observe, after what has been argued, that the precise import of the phrase "treasonable practices" has never been settled by any legal decision ; and if by the word "*practices*" we are to understand "*Acts*," it certainly will be difficult to mark the line of distinction. In the course of the argument, to shew that "treasonable practices" are entitled to privilege, the case of *John Wilkes* has been entirely relied on. It has been said, that by this decision it was settled that a Member of Parliament charged with having written and published a

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sedition libel was entitled to privilege ; and from thence it has been inferred that a Member, charged with " treasonable practices," must also be entitled to his privilege. Now, admitting this case for the present, to be law, it by no means follows because a seditious libel is entitled to privilege, that treasonable practices must also be entitled to it. If indeed, the latter was the minor offence of the two, it might be inferred ; but this is not the case, for in point of fact, it is the major and not the minor offence. To constitute treason, there must be an actual design against the King or his Government in contemplation ; and it is in this that it is distinguishable from sedition, which comprehends such offences (not being capital) as are of like tendency, but without any actual design against the King or his Government. A charge therefore, of doing a thing *seditionously* cannot amount to a charge of *high treason* ; since that which is seditious, and no more, can only partake of the nature of sedition. But, for the same reason, that which is treasonable must partake of the nature of treason, and consequently be a crime of greater magnitude than any act which is merely seditious. The case of *Wilkes* then, if admitted to be law, proves that the privilege of Parliament extends thus far, that is, to *sedition acts*, but affords no proof whatever that it extends beyond them to " *treasonable practices*." But the decision in the case of *John Wilkes* the Court cannot receive as law, because it has been solemnly disclaimed by both Houses of the British Parliament. The Judgment, in this well known case, (pronounced May 3rd, 1763,) at the first meeting of Parliament afterwards, was taken into the consideration of both Houses, and the discussion

ended on the 29th Nov. 1763. in a joint vote, by which it was resolved, "That the privilege of Parliament doth not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence." (a) Let the order therefore be, "that he take nothing by his motion."

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WILLIAMS, J. I shall not touch upon all the points that have been so ably stated by the Chief Justice. In the case of *Wilkes*, it was the admission of the Counsel for the Crown, that established the fact of his being a Member. In the present case there is no such admission; nor is there any evidence before the Court that *Mr. Bedard* either was, or is, a Member of the Provincial Legislature. The decision of Lord *Camden* was, certainly not correct; nor can it be received as legal authority;—for the offence with which *Mr. Wilkes* was charged was clearly an indictable offence.—The Members of the House of Assembly of Lower Canada are, without doubt, entitled to the enjoyment of their lawful privileges, which ought not to be invalidated or restrained. But what are those privileges? They are those which are granted them upon the claim made by their Speaker, at his presentation to the King's Representative for approval, after his election to that office. The principal of which are "freedom of Speech," for the purpose of managing their debates; and "freedom of person" during the Session of Parliament, and while going to and returning from thence, in order to

(a) Comm. Journ. 24th Nov. 1763.
Lords' Journ. 29th Nov. 1763.
Almon's Deb. Com. for 1763.

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enable them to perform their public duty there. I entirely agree in opinion with the Chief Justice that the motion cannot be granted.

KERR, J. I do not think it necessary to give any opinion upon the important questions raised in the course of the argument upon this motion. The first point submitted to our consideration, is whether the two Indentures supposed to be the returns of Mr. *Bedard* as a Member of the last House of Assembly and of the present, are sufficiently proved, or in other words, if his Counsel has offered legal evidence of his being within the exception contained in the 6th Section of the Provincial Statute. I am entirely of opinion with the Chief Justice, that we have not evidence of his being a Member of the last, or of the present Parliament, and consequently, we have not now to decide whether a Member of the Assembly has his privilege in the case of "treasonable practices." I will not follow this question then *ab omnibus quærenda*, but should it come regularly before the Court, we must not shrink from the execution of our duty. It is sufficient for me to state, that I agree in opinion with the Court, that this Motion ought not to be granted.

Motion denied.

It is but justice to the memory of Mr. Bedard to notice that on the 12th day of Decr. 1812, he was elevated to the Bench, and continued to discharge the duties of his office until his death, a period of about seventeen years.

HAMILTON AND ANOTHER *against* FRASER AND OTHERS.

IN this case a rule was obtained, calling on the Defendants to shew cause why a Writ of Prohibition should not issue to stay proceedings in a certain suit in the Court of Vice Admiralty brought by the present Defendants, for work and labour, in the Salvage of a certain Ship and cargo, at the *batture* of Mille Vaches, in the River St. Lawrence.

The Libellants in the Court of Vice Admiralty,—*Fraser* and others,—alleged in the first count of their libel, “ That the Respondents, as owners and proprietors of a certain ship or vessel, called the *Trio*, “ on the third of November last, upon the high and “ open seas, within the jurisdiction of the Court of “ Vice Admiralty of this Province, *to wit*, at the “ *Batture of Mille Vaches in the River St. Lawrence*, “ were indebted to the Libellants in £2000 for the “ work and labour, care and diligence of the Libellants before that time on the high and open seas “ *aforsaid*, done and performed by the Libellants in “ the Salvage of the said ship, and of the cargo where “ with the said ship was forced and driven on shore “ and stranded, and after she was got afloat, to wit, “ on the third day of November last, at the Batture “ of Mille Vache *aforsaid*, was loaded, and for “ money by the said Libellants in that behalf laid out “ and expended.” And the Libellants averred “ that “ the Respondents being so indebted promised to pay

20th Febr'y,
1811.

A Prohibition may issue from the Court of King's Bench to stay proceedings in the Court of Vice Admiralty.

A suit for Salvage of a Ship stranded on a sandbank in the River St. Lawrence, the *locus in quo* being *infra corpus comitatus*, held that the case was not one of Admiralty jurisdiction, and a prohibition granted to stay further proceedings therein.

The River St. Lawrence, from the west end of Anticosti to the eastern line of the District of Three Rivers, is within the District of Quebec.

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“ this sum of £2000 on the high and open seas and
 “ within the ebbing and flowing thereof, *to wit*,
 “ at the Batture of Mille Vaches aforesaid.” This
 promise is repeated in a second count against the
 Respondents “ as Agents and Consignees or Factors
 of the ship Trio,”—is laid in a third count by way
 of *quantum meruit*, the Respondents being therein
 charged as “ owners and proprietors of the ship
 Trio,”—and is again laid in a fourth count by way
 of *quantum meruit*, the Respondents being therein
 charged as “ Agents and Consignees or Factors of
 the ship Trio.” The *locus in quo* with respect to the
 work and labour performed by the Libellants and to
 the promise made by the Respondents being averred
 in each of these counts to be “ on the high and open
 “ seas and within the ebbing and flowing thereof, *to*
 “ *wit*, at the Batture of Mille Vaches aforesaid.”

To this Libel, the Respondents put in a plea to the
 jurisdiction of the Court of Vice Admiralty averring
 the Batture of Mille Vaches (the *locus in quo*) to be
 “ in the County of Northumberland, in the District
 of Quebec, in the Province of Lower Canada, without
 the jurisdiction of the Court of Vice Admiralty and
 within the jurisdiction of this Court.”—And issue
 having been joined upon this point, the plea to the
 jurisdiction by the Court of Vice Admiralty was over-
 ruled without the adduction of any proof whatever on
 either side. These facts were set forth in the sugges-
 tion and verified.—1st. By sworn copies, of the Libel,
 of the plea to the jurisdiction, of the Replication, and
 of the decree overruling the plea,—and 2ndly. By
 affidavits, in which it is sworn “ that the place called

“ the *Batture* of Mille Vaches is, at or near a certain
 “ part of the northern bank of the River St. Law-
 “ rence, upwards of one hundred miles from the
 “ mouth of the said river and from any part of the
 “ high seas, and within the District of Quebec, and
 “ not elsewhere.”

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SEWELL, CH. J. delivered the opinion of the Court.

Upon mature consideration, we are of opinion, that the motion must be granted, and a prohibition awarded to the Court of Vice Admiralty. This decision will restrain the Court of Vice Admiralty from the exercise of a jurisdiction to which it has formally laid claim, and we are on this account desirous to make the principles of our judgment distinctly known, I shall, therefore, take occasion to state them, but as the present is the first case in which a prohibition has been awarded to the Court of Vice Admiralty out of this Court, I shall show in the first instance the power and the authority of the Court of King's Bench to award this Writ.

Every Court of limited jurisdiction must be subject to control, for where there is no control there can be no limited jurisdiction. In England, all such Courts, (and among them the Admiralty,) are superintended and restrained within the proper bounds of their authority, by the superior Courts of Westminster Hall. And in the King's Colonies in America, the same power, with respect to the Courts of Vice Admiralty, has been exercised by the superior Courts of common law. In *Key and Hubbard v. Pearse*, (a) Pearse libelled in the Vice Admiralty Court of New York, and

(a) Douglas 608.

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the plea of Key and Hubbard to the jurisdiction being refused, they obtained from the Court of King's Bench of that Province, a Writ of Prohibition. The issue in the cause was, "whether the ship seized was prize or no prize," a question over which the Court of Admiralty holds an unequivocal and exclusive jurisdiction, and it was accordingly determined at the cockpit, that the prohibition had been improperly issued, but the general authority of the Provincial Court of King's Bench, to award the Writ of Prohibition, was not at all doubted. The Lord Chief Justice *Lee*, in delivering the judgment, said :—" As this is a question " upon prize, I think the Common Law Court had no " right to prohibit," and Lord Mansfield, (referring to this decision,) afterwards said, in the case of *Lindo v. Rodney* : — " This case (*Key & Hubbard v. Pearse*,) was argued, and could only be " argued as a mere question of law, just as if it had " arisen in Westminster Hall, upon a capture in the " River Thames, within the body of a county. *The " Courts of Law in the Colonies prohibit the Court of " Admiralty just as the Courts of Westminster Hall do " here.*" (a) The power of prohibiting the Court of Vice Admiralty when it exceeds the limits of its jurisdiction, must then be vested in some or other of His Majesty's Ordinary Courts of Law in this Province, and as the Courts of King's Bench and of Appeals are the only Courts of ordinary jurisdiction in the Province, we have to inquire in which of them it is vested. For this purpose it must be remarked, that the distinction between the Writ of Prohibition and

(a) Douglas 619. in notis, 2. Chalmer's opin. 207-215.

the Writ of Appeal is essential. When a Court has jurisdiction, and gives a wrong sentence, that sentence is the subject matter of Appeal, and not of prohibition; but if it has not jurisdiction, prohibition is the legal remedy. The Writ of Appeal removes the cause into the Superior Tribunal for investigation upon the merits of the case itself, in reference to the parties and their respective rights. The Writ of Prohibition does not remove the proceedings, nor does it lead to any investigation of the merits, except in so far as they tend to elucidate the question of jurisdiction. Now, the jurisdiction of the Court of Appeals is limited by Statute, (a) and extends only "to causes appealed from civil jurisdictions wherein by law an appeal is allowed;" so that the Court of Appeals cannot take cognizance of the proceedings of the Admiralty, unless it be by Writ of Appeal, and it is certain that no appeal is by Law allowed from any decision of the Court of Vice Admiralty, except to the High Court of Admiralty in England, or to the Court of His Majesty in Privy Council. (b) It follows, that the Provincial Court of Appeals has no jurisdiction whatever with respect to the Admiralty. A Writ of Prohibition to the Admiralty cannot therefore, issue out of that Court, and consequently must issue out of the Court of King's Bench. To what I have said upon this part of the subject, I shall add, that the power and authority of this Court to award the Writ of Prohibition, and to award the Writ of *Certiorari*, (which we daily issue,) stand in principle upon the same ground. Both Writs are designed for the control of limited Tribunals, to restrain and keep

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(a) 34 Geo. III. c. 6. s. 23.

(b) 3. Black. Com. 69.

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them within the true bounds of their respective jurisdictions, and both are equally necessary for preserving inviolate the legal distribution of judicial authority. (a)

The general question which arises out of the facts set forth in the suggestion and in the Affidavits filed in support of it, is this: "Whether the Court of Vice Admiralty has jurisdiction in a case of Salvage arising and entirely completed within the limits of the Province?" And we are of opinion, as already intimated, that it has not. The ground of this opinion shall now be shown, and to this end, certain propositions, on which we rely, shall be stated with the authorities on which they are founded.

We hold then, as a general rule, 1. That according to the Civil and Maritime Law of England, the High Court of Admiralty of England, cannot hold plea of any matter arising within the jurisdiction of the ordinary Courts of Law; and that it cannot hold plea of any matter arising within the limits of the Realm, or Kingdom of England, *because the limits of the jurisdiction of the ordinary Courts of Law, are co-extensive with the limits of the Realm.*—2. That certain cases are exceptions to this general rule, but that Salvage arising and completed within the jurisdiction of the ordinary Courts of Law is not one of the excepted cases.—3. That the Provincial Court of Vice Admiralty has no greater or other authority than that of the High Court of Admiralty of England. It will follow from these propositions (when established,) that as the High Court of Admiralty of England cannot, so the Provincial Court

(a) The "Appel comme d'Abus," and the "défense d'exécuter," are in fact prohibitions. See the introduction to the Edition of Denizart, by Lecamus, 73. L. C. Den. Verb. "Défense d'exécuter," s. 1, No. 1. 2. and 3. Vol. 6. p. 77. p. 78.

of Vice Admiralty cannot hold plea of any matter of Salvage arising and completed within the jurisdiction of the ordinary Courts of Law, and consequently that the Provincial Court of Vice Admiralty cannot hold plea of any matter of Salvage arising and completed within the limits of the Province, if the limits of the jurisdiction of the ordinary Courts of Law of the Province be co-extensive with the limits of the Province. I proceed to the consideration of the first proposition :—

It is laid down as a general rule that the jurisdiction of the instance Court of Admiralty of England is confined to matters arising on the high Seas, (*b*). It is true that it does not seem to be agreed what shall be taken to be the high Seas in all cases, but it is equally true that a River, Creek or Haven within the limits of any country, constituting a part of the Realm or Kingdom of England, is clearly held not to be a part of the high Seas, and that the instance Court of Admiralty cannot take cognizance of any matters made or done in any such River, Creek or Haven, because all matters arising there may be heard and determined in the ordinary Courts of Law. (*b*.) “ It is a rule,” says McDouall, “ in the Law of England, that the Admiral’s jurisdiction is confined to matters arising on the high Sea, and therefore he cannot take cognizance of Contracts &c. made in any River, Haven or Creek within England, for those are triable by the Common Law.” (*c*) By the Statute 13, Rich. II. c. 5. it is enacted, “ That the Admirals and their Deputies shall not intermeddle from henceforth of any thing done within the Realm, but only of a

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(*b*) 1. Bacon, 623.

(*c*.) 2. McDouall’s Ins. 543.

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“ thing done upon the Sea.” By the Statute 15, Rich.
 “ II. c. 3, it is enacted, “ That of all manner of
 “ Contracts, Pleas and Quarrels, and all other things
 “ rising within bodies of Counties, as well by wa-
 “ ter as by land, and also, of wreck of the Sea, the
 “ Admiral’s Court shall have no manner of cognizance,
 “ power or jurisdiction, but all such manner of Con-
 “ tracts, Pleas and Quarrels, and all other things rising
 “ within the bodies of Counties, as well by water as by
 “ land as afore, and also wreck of the Sea shall be
 “ tried, determined, discussed and remedied by the
 “ Law of the land, and not before, nor by the Admi-
 “ ral nor his Lieutenant in any wise.” and by the Sta-
 “ tute 2, Henry IV. c. 11, it is enacted as follows, viz :
 “ Whereas in the Statute made at Westminster the
 “ 13th year of the said King Richard, among other
 “ things it is contained, that the Admirals and their
 “ Deputies shall not intermeddle from thenceforth of
 “ any thing done within the Realm but only of a thing
 “ done upon the Sea, according as it hath been duly
 “ used in the time of the noble King Edward, grand
 “ father to the said King Richard, now our said Lord
 “ the King wills, and granteth that the said Statute
 “ be firmly holden and kept and put in due execu-
 “ tion.” Such are the Statutes, which according to
 “ Stamford, are to be considered as Statutes declaratory
 “ of the Common Law. “ Per common ley (says he,)
 “ devant le Statut anno 2do Henrici IV. c. 11. L’Ad-
 “ miral n’avé jurisdiction, *sinon sur le haut meer,*” and
 “ by a series of decisions, the provisions which they con-
 “ tain, are adjudged to be the Law Civil and Maritime of
 “ England. In Cradock’s case, it was said “ the intent
 “ of the Statute 13, Rich. II, was to prevent the Admi-

“ral’s Court from holding plea of any thing happening “within the Realm,” and a prohibition was granted. (a) In *Leigh v. Burley*, a prohibition was awarded because, *per curiam*; “the Contract was made on land “and *infra corpus comitatus*, and therefore the Admiral “can have no jurisdiction, for the Statutes 13 and 15 “of Richard II. and 2d Hen. IV. c. 11, are that the “Admiral shall not have conusance but of things done “*super altum mare* and Cook, (Justice) said when a “place is covered over with salt water and is out of “any County or Town there, *est altum mare*, but “where it is within any County, *there it is not allum mare*; and trial shall be *per vicinetum*,” (b) In the case of the *Lord Admiral v. Linsted*, the suit was instituted in the Admiralty for a ship as flotsam, left near an harbour in Norfolk, and it was agreed that flotsam ought to be tried in the Admiralty; but a prohibition was ordered *per curiam*, “*Because the suggestion was “that the dereliction was infra corpus comitatus*. (c) In the case of *Culliver and Brand*, a ship was wrecked by tempest in a creek of the Sea, “*Infra corpus comitatus* of Dorset.” The Sailors upon pretence that the goods in the ship were *bona peritura* procured a commission of sale out of the Court of Admiralty, whereupon the owners to prevent the sale “brought “a supersedeas,” and upon producing the libel to the Court, a prohibition was granted, “*because the cause “of action did arise infra corpus comitatus and so the “Admiralty cannot hold plea thereof*.” (d) In Coke’s report of the anonymous case in the Reign of Edward I. it is said, the Sea within the jurisdiction of the Ad-

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(a) 2. Brownlow, 37.
(c) Siderfin, 178. p. 9.

(b) Owen, 122.
(d) 2. Sid. 81.

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miral is out of every County, for if the Sea be in any County then Pais may come from thence. The Admiral hath jurisdiction when the Common Law cannot give remedy. (a) Upon the reference made in the 7th of Jac. I. in the case of Sir *Richard Hawkins*, Vice Admiral of Devon, to the Chief Justices of the King's Bench and Common Pleas, and to the Chief Baron of the Exchequer, it was by them resolved "that by the Common Law the Admiral ought not to meddle with any thing done within the Realm, and only with things done upon the Sea, and this," say they, "appeareth fully by the Statutes 13, Rich. II. c. 5, and 2d Hen. IV. c. 11," (b.) In further proof of the present proposition, I refer to the cases which are cited by "the Judges of the Realm," in their answers to the *articuli Admiralitatis*, (c) of which the first answer is as follows: "By the Laws of this Realm the Court of the Admiral hath no conusance, power or jurisdiction of any man, nor of Contract, Plea or *querelle*, within any County of the Realm, either upon the land or the water, but every such Contract, Plea or *querelle*, and all other things rising within any County of the Realm, either upon the land or the water, and also, wreck of the Sea, ought to be tried, determined, discussed and remedied by the Laws of the land, and not before, or by the Admiral, nor his Lieutenant, in any manner, so as it is not material whether the place be upon the water *infra fluxum et refluxum aquæ*, but whether it be upon any water within any County. Wherefore we acknowledge that of Contracts, Pleas and *querelles* made upon the Sea or any

(a) 12. Rep. 80.

(b) 13. Rep. 52.

(c) 4. Inst. 136—147.

part thereof which is not within any County, the Admiral hath and ought to have jurisdiction, and no precedent can be shown, that any prohibition hath been granted for any Contract, Plea or *querelle* concerning any maritime cause done upon the Sea, taking that only to be the Sea wherein the Admiral hath jurisdiction, which is before by Law described to be out of any County. (a) In later times, the same opinion has uniformly been held in the Courts of Westminster Hall. In the Common Pleas, in *Ross v. Walker*, (b) *Ross*, who was a pilot, was sent for to Gravesend to come on board the ship *Oxford*, being in Sea reach, who accordingly went on board of her *there*, and piloted her from thence to her moorings at Deptford, and for his wages due to him upon that account, he instituted a suit in the Admiralty, upon which a prohibition was moved for, upon a suggestion, that both the Contract and the work done, were within the body of the County, and an affidavit that Sea reach is within the body of the County, and a prohibition was ordered, and *per curiam*; "There is no instance to be found where the Contract was at land, and to do the work on board *within the body of some County*, that the Common Law Courts have ever permitted the Admiralty to have jurisdiction." (b) In *Velthasen vs. Ormsley*, (c) on the authority of the decision in *Violet vs. Blague*, (d) it was admitted on both sides, that the Admiralty had no jurisdiction in the case, *because the running foul and breaking of the Libellants' vessel had happened on the Thames, within the County of Kent*, and a prohibition was accordingly awarded by Lord Kenyon, and the

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(a) 4. Inst. p. 134.

(b) 2. Wils. 265.

(c) 3. T. Rep. p. 315.

(d) Cro. Jac. 514.

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Court of King's Bench, and in delivering the Judgment of the same Court in *Lindo vs. Rodney*, Lord Mansfield said, "the view, purport and tendency of the Statutes is to prevent the Admiralty from trying matters triable at Common Law. These Statutes don't exclude the Common Law in any case, and they confine the Admiralty, by the locality of the thing done, which is the cause of action, *it must be done on the high seas, if done in Ports, Havens or Rivers, within the body of a County of the Realm, the Admiralty is excluded.*" (a) From these authorities it is certainly clear *as a general rule*, that the High Court of Admiralty of England has no jurisdiction over any matters arising within the Realm, and that the reason of this rule is, that such matters having arisen within the jurisdiction of the Common Law Courts, must there be tried.

It is admitted by our second proposition that "certain cases are exceptions to this general rule," but we hold that "Salvage arising and completed within the jurisdiction of the ordinary Courts of Law, is not one of the excepted cases." Sueing for Mariners wages, founded on Contracts, and for money due upon hypothecation bond, which have been executed within the jurisdiction of the ordinary Courts of Law, are familiar instances of such exceptions, confirmed by the recent decisions in *Howe and Napier*, (b) and *Menetone and Gibbons*, (c) which have been cited at the Bar. But of these exceptions the former is said (by Lord Mansfield,) in the case of *Howe and Napier*, to be founded on services performed at Sea, (d) and the latter is said

(a) Douglas, 615.
 (c) 3. T. R. 269.

(b) 4. Burr. 1944.
 (d) 4. Burr. 1950.

by *Powell*, (Justice,) in the case of *Johnson v. Shepney*, (a) to be founded on the principle, that the Master must have power to take up money during a voyage upon hypothecation to supply the necessary wants of his ship occasioned by stress at sea. (b) But independent of these considerations it must be remembered, that the proof of one exception is no evidence of the existence of another. Our inquiry is, whether salvage arising and completed within the jurisdiction of the Ordinary Courts of Law be also an exception?—And if it be, it was incumbent on the Libellants to shew it, and this they have not done; not a single authority of any description has been produced to contradict, in this respect, the general rule or the assertion of Abbot, “that the Admiralty has jurisdiction *if the salvage be performed at sea*,” (c) and not otherwise.

I proceed to shew 3. that the Provincial Court of Vice Admiralty has no greater or other authority than that of the High Court of Admiralty of England. The Courts of Vice Admiralty in the British American Colonies are branches of the jurisdiction of the Admiral of England, and appeals from the decisions of these Vice Courts are therefore brought before the High Court of Admiralty of England not only in ordinary cases, but even in revenue cases, in which a jurisdiction is given to them by statute without any provision whatever for appeals. (d) In this Province, as in all others belonging to His Majesty, the Judge of the Court of Vice Admiralty holds his office by commission from the High Court of Admiralty of England, by which, under the Seal

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(a) 6. Mod. 79.

(c) Abbot. 2. Ed. 357.

(b) 1b. *Lister v. Baxter*, Str. 695. (d) 2. Robinson's Rep. 246-248. note. (a)

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of that Court, he is appointed "Commissary in Lower Canada." It might, therefore, be sufficient to say, that as the Courts of Vice Admiralty are thus emanations of the High Court of Admiralty of England, their jurisdiction cannot exceed that of the Court from whence they originate. The inferior cannot possibly be more than equal to the superior; nor can the deputy (and they are deputies of the Admiral) possess more power or authority than the principal from whom their whole power and authority is derived. I shall, however, have recourse to the commission by which the Judge of the Court of Vice Admiralty in this Province is appointed, which I find upon research to have been uniformly the same from the conquest to the present time. (a) By that commission, the power granted to the "Commissary" or Judge of the Provincial Court of Vice Admiralty, is, "to take cognizance of, and proceed in all causes, "civil and maritime, and in complaints, contracts, &c. "and such causes, complaints, contracts, and other "the premises above said, or any of them, (however "the same may happen to arise, be contracted, had "or done,) *to hear and determine according to the "civil and maritime laws and customs of the High "Court of Admiralty of England."* (b) And this to me is conclusive, for since the same rule must necessarily obtain in all Courts whose proceedings are governed by the same laws and customs, it is plain that

(a) Records in the office of the Secretary of the Province.

(b) "By this commission" (says the Report of the Governor and Council of Quebec, to His Majesty, drawn by Baron Mazeres, the Attorney General, in 1769.) "it is evident your Majesty has introduced into this Province all the laws of your Majesty's English Court of Admiralty, in lieu of the French laws and customs by which maritime causes were decided in the time of the French Government." Mazeres collection, p. 19:

the Provincial Court of Vice Admiralty can have no greater or other authorities, power or jurisdiction, than that of the High Court of Admiralty; therefore, as the civil and maritime laws and customs of the High Court of Admiralty do not enable it to take cognizance of any case of salvage except such as arise on the high seas, the same rule must here obtain in the Court of Vice Admiralty, and as according to the same civil and maritime laws and customs, any place which is within the limits of the jurisdiction of the Ordinary Courts of Law is not part of the high seas, it follows that neither the High Court of Admiralty, nor the Provincial Court of Vice Admiralty can lawfully take cognizance of any case of salvage arising in any such place. It is set forth in the libel that the salvage was performed on the high seas. But, by the suggestion it is averred, and by the affidavits filed with the suggestion it is sworn, that it was performed "at the Batture of Mille Vaches, within the District of Quebec, within the jurisdiction of *this* Court, and not elsewhere."

In *Ross and Walker*, it was said by the Court—"It is and must be laid in the libel that the contract and the work were both on the high seas, yet we must now take the suggestion to be true, and that both the contract and the work were at land." (a) It is not therefore necessary, perhaps, at this time to shew why the *Batture of Mille Vaches* (which is the *locus in quo* in this case, and is upwards of one hundred miles above the west end of the Island of Anticosti,) is within the limits of the District of Quebec, and within

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(a) 2 Wils. Rep. 265.

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the jurisdiction of the Court. But as we deem it right in a case of this description to state fully the entire grounds of our opinion, I shall do so, and for this purpose I shall detail in chronological order, the several Public Instruments and Acts, which relate to the boundaries of this Province and to the limits of the three Districts of which it is composed. Having first premised, that by the 2nd Clause of the Provincial Statute 34, Geo. III. c. 6. this Court has original jurisdiction and power in this District, "To take cognizance of, hear and determine all causes as well civil as criminal, except those which are purely," that is, exclusively, "of Admiralty jurisdiction." The first Instrument in order is the Royal Proclamation of the 7th of October, 1763, which thus describes the Government of Quebec, "bounded on the Labrador coast by the River St. John, and from thence by a line drawn from the head of that River through the Lake St. John to the south end of the Lake Nepesim, from thence the said line crossing the River St. Lawrence and the Lake Champlain in forty-five degrees of north latitude passes along the high lands which divide the rivers which empty themselves into the said River St. Lawrence from those which fall into the sea, and also along the north coast of the Baie des Chaleurs and the coast of the Gulf of St. Lawrence to Cape Rosiers, and from thence crossing the mouth of the River St. Lawrence, by the west end of the Island of Anticosti, terminates at the aforesaid River St. John." The next Act is the Statute 14, Geo. III. c. 83. usually called the *Quebec Act*, by which it is enacted, "that all the Territories, Islands and Countries in North Ame-

“rica belonging to the Crown of Great Britain, and  
 “bounded as therein described, and all such Territo-  
 “ries, Islands and Countries which have since the  
 “tenth day of February, 1763, been made part of the  
 “Government of Newfoundland, be, and they are  
 “hereby during His Majesty’s pleasure *annexed to*  
 “and made part and parcel of the Province of Que-  
 “bec as created and established by the said Royal  
 “Proclamation of the 7th October, 1763.” The next  
 Instrument in succession is the Order of His Majesty  
 in his Privy Council of the month of August, 1791.  
 by which under the power reserved to him by the 14th  
 of Geo. III. c. 83. recognized in the Statute 31, Geo.  
 III. c. 31. he divides the Province of Quebec into  
 two distinct Provinces to be called the Province of  
 Upper Canada and the Province of Lower Canada by  
 separating the said two Provinces according to the  
 following line of division, that is to say, “to com-  
 mence at a stone boundary, on the north bank of the  
 Lake St. Francis at the Cove west of Point au Baudet,  
 on the limit between the Township of Lancaster and  
 the *Seigneurie* of New Longueuil, running along the  
 said limit, in the direction of north forty-four degrees  
 west to the westernmost angle of the said *Seigneurie*  
 of New Longueuil, thence along the north-western  
 boundary of the *Seigneurie* of Vaudreuil running  
 north twenty-five degrees east until it strikes the Ot-  
 tawa River, to ascend the said River into the Lake  
 Temiscaming, and from the head of the said Lake by  
 a line drawn due north until it strikes the boundary  
 line of Hudson’s Bay.”—There are no other public In-  
 struments or Acts, which relate to the boundaries of  
 this Province, except those which I have cited, and

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from these it is evident that the River St. Lawrence upwards from its mouth, *that is*, from a line drawn at the west end of the Island of Anticosti from Cape Rosiers on the south shore to the mouth of the River St. John on the north shore, was originally included within the limits and constituted a part of the Province of Quebec, as created and established by His Majesty's Proclamation of October, 1763. and that all which constituted the Province of Quebec so created and established is now the Province of Lower Canada, except what forms the Province of Upper Canada, which commences at the line of division declared by His Majesty's Order in Council of the month of August, 1791. some miles above the City of Montreal.

As to the limits of the District of Quebec it is necessary only to refer to the first section of the Provincial Statute 34, Geo. III. c. 6, by which it is enacted, " that the Province of Lower Canada shall consist of three Districts, to be called the District of Quebec, the District of Montreal, and the District of Three Rivers ; that the District of Quebec shall be bounded to the westward by the eastern line of the *Seigneurie* d'Orvilliers, as far as it extends, and thence by a due north-west line to the northern boundary of this Province, on the north side of the River St. Lawrence, and by the eastern line of the *Seigneurie* of Saint Pierre les Becquets as far as it extends, and thence by a due south-east line to the southern boundary of this Province on the south side of the River St. Lawrence, and the said District of Quebec shall comprehend all that part of this Province which lies to the eastward of the beforementioned western boundary lines of the said District." From these public Instruments and Acts it

is apparent that the *Batture* of Mille Vaches being very far above the west end of the Island of Anticosti, and as the line drawn from Cape Rosier to the River St. John, is within the limits of this Province of Lower Canada, and being also very far below the eastern lines of the Seigneuries of D'Orvilliers and St. Pierre les Becquets, is also within the limits of the District of Quebec, so that all causes there arising are *infra corpus comitatus* and within the jurisdiction of this Court.

If the parties in this case are not satisfied with this opinion, they know that they are not bound by the present proceedings,—it is, particularly, in the power of the Libellants, to compel the Respondents to declare in prohibition, to perfect an issue upon the matters contained in the suggestion, to obtain the Judgment of this Court on that issue, to appeal from that Judgment to the Provincial Courts of Appeals, and ultimately to obtain the decision of His Majesty, in His Privy Council, upon the whole case.

Rule Absolute. (a)

(a) Since this decision, prohibitions have been awarded in the Court of King's Bench at Quebec, in the following cases :—*Murphy v. Wilson*, in 1822, for an assault and battery in a foreign port. *Jones v. Howard*, the case of the *Camillus* for damage done by collision in the Port of Quebec, in 1823. *Willis v. Soucy*, for pilotage in the River St. Lawrence, in 1827. *Garret v. Morgan*, Master of the *Onandago*, 12th June, 1834, for the recovery of a capitation tax paid in Ireland. *Hurley and another v. Short*, for a loss of passenger's goods at Grosse Isle, June, 1834.

In a Statute passed in the United Kingdom, 2 Will. IV. c. 51. intituled "An Act to regulate the practice and the Fees in the Vice Admiralty Courts abroad, and to obviate doubts as to their jurisdiction," the following Clause is contained :—"Whereas, in certain cases, doubts may arise as to the jurisdiction of Vice Admiralty Courts in His Majesty's possessions abroad, with respect to suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty's service at sea, salvage and droits of Admiralty; be it therefore enacted, that in all cases where a ship or vessel, or the Master thereof, shall come within the local limits of any Vice

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WHITFIELD AND COATES *against* HAMILTON AND
ANOTHER.

April 8th,
1811.

It is not necessary, in Canada, in an action for a malicious arrest of property, to set forth, in the declaration, that the action in which the arrest was made has been terminated.

THIS was an action of Damages for a malicious arrest of the Plaintiff's property by attachment or "*arrêt simple*." The Defendants demurred to the Declaration, and

Bowen and Fletcher, in support of the Demurrer, contended that no action for a malicious arrest lies before the action in which the arrest was made is determined, and that the declaration ought, therefore, to have set forth that the action instituted by the Defendants against the Plaintiffs had been terminated, that the determination of the former suit was required for such lights as it might happen to afford in evidence on one side or the other, and to prevent contradictory judgments. (a)—Also that the declaration was defective in this further respect, that it did not aver, that no debt was due by the Plaintiffs to the Defendants when their property was arrested, so that the former admitted a probable cause for the arrest, but that the

"Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice Admiralty Court, notwithstanding the cause of action may have arisen out of the local limits of such Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits." This enactment does not seem to remove, in any way, the doubts therein referred to. It would have been desirable that this Clause of the Statute had been more clear and explicit than it is. No question has yet arisen in the Courts here upon the construction to be given to it.

(a) *Fisher v. Bristow*, 1. Doug. 215. *French v. Atkinson*, Willes 517. *Morgan v. Hughes*, 2. T. R. 225. and *Kirk v. French*, 1 Esp. N. P. C. 80.

want of a probable cause and malice were both necessary to complete the action. (a)

Perrault, on the other side, insisted that there was no analogy between the cases cited and the present case. That in England and in that class of cases to which the defendants had referred, the gist of enquiry was the existence of the debt sworn to, but that in this case the inquiry would be whether the plaintiffs,—when their property was seized,—were about to abscond, or otherwise to defraud their creditors; and that if the defendants had maliciously laid such an intention to their charge without any probable cause and the plaintiffs had sustained damage, it was plain that they must recover the amount of such damage whether a debt was or was not due by them; and therefore, it was unnecessary to allege in the declaration that the former action had been determined: and as it had been determined that contradictory affidavits could not be filed to rebut the effects of an affidavit for an arrest of the person, and the same rule must necessarily obtain in cases of attachment by *arrêt simple* of property, there could not be contradictory judgments.

SEWELL, CH. J. It is undoubtedly true that in an action for a malicious arrest, in England, it must appear, and must therefore be alleged in the declaration, that the former suit in which the plaintiff was arrested is terminated by a judgment of *non pros.*, a verdict or discontinuance. (c) In this case, the ar-

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(a) *Sutton v. Johnstone*, 1. T. R. 493.—*Goslin v. Wilcock*, 2. Wils. 305. *Purton v. Horner*, 1. Bos. & Pull. 205.

(b) 1. Chitty on Plead. 133. Bac. Abr. Actions on the Case, letter H.

(c) 1. Esp. N. P. C. 80.—2. Esp. Dig. 531.

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rest was of the Plaintiff's property, for which,—if it was malicious,—an action certainly lies in the law of Canada. (a) But it is essential to remark that the grounds on which the process of arrest is here obtained, are not the same as in England : there, it is obtained on the affidavit of the plaintiff, in which he swears that a debt is due to him, and no more, so that the question of malice or no malice turns entirely on the existence of the debt. Here, for the arrest of property, it is obtained on the affidavit of the plaintiff, who not only swears to his debt, but swears also that the defendant intends to abscond, or depart the Province, or to secrete his effects *for the purpose of defrauding his creditors*, and the question of malice or no malice turns, sometimes on the inquiry whether the plaintiff had good cause to charge the defendant with such a fraudulent intention, sometimes on the existence of the debt, and sometimes on both. In many cases then, the debt may be due, and yet the arrest be malicious ; as for instance, where the plaintiff has charged the defendant with a fraudulent intention to abscond when he well knows that he had no such intention ; and in such cases, quoad the action, it is immaterial whether the debt was due or not, although it may be material quoad the quantum of damages ; and it cannot be necessary to shew, either on the face of the declaration, or in evidence, that the former suit, in which the arrest was made, has been terminated. This may be the case in the present instance, for aught we can say, and the demurrer must, therefore, be dismissed.

Demurrer dismissed.

(a) 2. Domat. 218, Supp. au Dr. Pub. lib. 3. tit. 11. art. 4.

MEIKLEJOHN v. YOUNG AND ANOTHER. .

April 10th,
1811.

A RULE was obtained for the homologation of an award of certain arbitrators who had been appointed by the parties in this case to decide upon all matters in difference between them. The reference had been made to three arbitrators, and although the three had heard the parties and were all present when the award was made, two only had signed it, and the third had refused. The cause shewn against this rule was that the reference was general to three persons, and that the award by two only was no award, that every award must quadrate with the terms of the submission, the whole authority of the arbitrators being derived from thence and founded on the consent of the parties. On the other side it was insisted that the award was good although the reference had been to three generally. (a)

Per curiam. When a reference is made to three arbiters, or specifically to any two of them, an award by two of the persons named is good, provided the third has due notice of the several meetings appointed and of the several matters referred to them, and this is law, because it is the plain intent of the submission; (b) but when the reference is to three generally, not only notice of all the matters referred and of the meetings is necessary, but moreover, it is re-

Upon a reference to three arbiters, or, specifically to any two of them, an award by two is good, if the third has had due notice of the matters referred and of the several meetings; but if the reference be to three generally, all should be present at the meetings, especially when the award is made, and then the award of two is valid, even if the third refuses to assent to it.

(a) 2. L. C. Den. v. Arbitrage 242. 2. Dict. de Dr. v. Sentence Arbitrate, 606. Rep. de Jur. v. Arbitrage.

(b) See Willes Rep. 215. and Jousse, Traité des Arbitrages.

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quired that the three arbiters should be present at the meetings, and particularly when the award is made ; yet if all these requisites are complied with, the award of two is sufficient, even where the third refuses his assent to it. As in the public tribunals of justice so in the private tribunals which the parties elect for themselves, the sense of the majority prevails. (a)

Award homologated.

MORROGH v. MUNN.

April 19th.
 1811.

The Prescription of a year, under the Custom of Paris, does not affect debts due to Merchants, which are not barred by a less period than six years.

IN this action, for goods sold, the defendant pleaded the prescription *annale*.

For the defendant it was contended that by the 127. art. of the Custom, the action of a merchant, for goods sold, was prescribed by the lapse of one year from the delivery of the last article sold ; and as upon the face of the declaration, it appeared that the sale and delivery had taken place fifteen months previous to the institution of this suit, the defendant was entitled to a judgment, dismissing the action.

Per curiam. The prescription *annale* is not, as the prescription of thirty years is, to the action, but to evidence ; this is manifest from the fact that in an action

(a) 1. Louet 149. L. C. Den. v. Arbitrage, § 3. n. 2. 1. Prat. Fran. 131. 4. Henrys 547. Jousse, Tr. des Arbitrages, No. 56. 6°.

brought even after the expiration of the year, the defendant cannot liberate himself without pleading and swearing that he is not in debt to the plaintiff for the causes set forth in his declaration. (a.) Danty, on the authority of *Charondas* and *Guenois*, declares that the 126th, and 127th articles of the Custom were adopted "pour retrancher la longueur des procès et la preuve par témoins," (b.) And in the case of *Meyrand v. Duberger*, (c.) the court said, "The plea must contain an averment that the debt has been paid, and a tender of the defendant's oath to that effect, by *hoc paratus est verificare*. The presumption of payment, from lapse of time, is the basis of this defence, and the law allows the defendant to prove it by his own oath, on account of the plaintiff's neglect to sue at an earlier day." The case of the *Duke de Bouillon*, reported in *Denizart*, is to the same purport, (d.) The prescription of a year being then a prescription to evidence only, and in all commercial cases, (of which this is admitted to be one,) the rule of evidence, which formerly obtained under the Custom of Paris, being abrogated by the Ordinance 25. Geo. III. c. 2. s. 10.

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(a) Danty, 698. No. 42. also p. 697.

(b) The *Analyse du Droit Français*, is even more distinct than Danty on this point, "De ces expressions des articles 125 et 126, '*ne peuvent faire action*,' il semble qu'on devrait conclure, que ces créanciers n'ont plus d'action, après le délai prescrit par la coutume; cependant l'esprit de la loi n'est que d'accorder au débiteur une fin de non recevoir contre le titre résultant des livres de ces Marchands. L'in de non recevoir, fondée sur une présomption légale de paiement; c'est pourquoi la jurisprudence oblige, dans ce cas, celui qui oppose la fin de non recevoir résultante des articles 125, 126 et 127. de la Coutume d'affirmer qu'il a payé, et de ses héritiers "Qu'ils n'ont pas connaissance de la dette" Page 521.

(c) This case was decided in the King's Bench at Quebec, in October 1808, and was an action for board and lodging. As the plea of Prescription in this case did not aver that the debt was paid, or contain an offer to prove it, the plea was dismissed.

(d) *Den. v. Prescription*, No. 98 99. 101. L. C. *Den. v. Chirurgien*, § 1. No. 13.

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which enacts, "that in proof of all facts concerning
 " commercial matters, recourse shall be had in all
 " courts, to the rules of evidence laid down by the
 " Law of England." The rule of the Law of England
 which provides,—“that all debts due to merchants
 may be proved by witnesses, or otherwise in the ordin-
 ary course of evidence, until the expiration of six
 years from the date of such debts,”—is the rule which
 we are bound to follow in the present case, and conse-
 quently the plea of the prescription *annale* must be
 overruled.

Plea of Prescription dismissed.

TURNER AND OTHERS v. WHITFIELD.

April 20th.
 1811.

If an inci-
 dental plain-
 tiff does not
 on the face of
 his declara-
 tion shew that
 his demand is
 connected
 with the de-
 mand in chief,
 the defend-
 ant must
 avail himself
 of this omis-
 sion by an ex-
 ception as to
 form; if he does not but answers, he waives the irregularity of the pro-
 ceedings and admits that he is rectus in curiâ.

To an incidental cross demand, fyled by the defen-
 dant in this cause, the plaintiff in chief pleaded the ge-
 neral issue, and demurred to the incidental plaintiff's de-
 claration—,and being this day heard upon the pleadings;
Bowen, for the incidental defendants, (*Turner et al.*)
 contended that this cross demand must be dismissed,
 as the incidental declaration did not, upon the face of
 it, shew any relation or connection between the de-
 mand in chief and the incidental demand. (a).

(a) 1. Fig. 338.—*Mure v. Lafleur*. K. B. Q. 1810. No. 41.

SEWELL, CH. J. An incidental cross demand is a demand instituted by the defendant in a suit against the plaintiff, for some cause of action connected with the matter put in litigation by the demand in chief, and in some way accessory to it. It is a mode of defence to a demand in chief, to which a defendant resorts in cases where by the rules of pleading he cannot avail himself of the matter of his defence in any other way. (a.) If, therefore, an incidental plaintiff does not, on the face of his declaration, make it appear that his demand is connected with the demand in chief, and arises *ex eodem fonte*, the incidental defendant may take advantage of his omission as a *fin de non procéder*, by an exception as to form; but if instead of so doing, he answers the demand against him, he waives the irregularity of the proceeding, and voluntarily submits the cause to the jurisdiction of the court, which he is permitted to do, *unicuique licet juri pro se introducto renunciare*. By answering he allows himself to be *rectus in curiâ*, and admits "that he ought to answer," and he cannot, therefore, afterwards plead that he ought not to answer. The incidental defendant in this case has answered the demand against him, by pleading the general issue and a demurrer, both of these pleas are answers *au fonds*, or, to the merits: the former is an answer to the facts stated in the libel of the declaration, the latter to the conclusions. The truth of the facts stated in the libel being denied by the general issue, and the legality of the conclusions by the demurrer. As the import of the demurrer amounts to this only—"That the con-

1811.
TURNER
v.
WHITFIELD.

(a) 1. Pig. 338. Jousse. Tr. des Présidiaux, 69-74.—Serpillon, 149.

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“ clusions cannot be granted, because taking all the
“ facts stated to be true, they do not amount to a legal
“ cause of action;” the question whether the incidental plaintiff, (supposing the facts stated in his demand, to be a legal cause of action,) can avail himself of them in the form and manner in which he has instituted his suit, is not before us ; and it is right to observe, that it ought to have been put, (if it was intended to put it,) by an exception as to form, because it is the proper province of an exception as to form, to shew, “ that by reason of some imperfection, defect, or want of form in the proceedings, as in the writ, or declaration, the court cannot proceed in the cause, nor compel the defendant to answer.” (a.) Then as the matter stands, the merits of the incidental demand in fact and in law, being solely before us, and not the form and manner in which this demand has been instituted, we can only decide upon the former ; and being of opinion that the facts stated in the libel of this declaration, if true, amount to an efficient cause of action, and consequently that the conclusions are legal and properly taken,

The demurrer must be over-ruled, and proof upon the issue of fact ordered. (b.)

(a) Forbes v. Atkinson, K. B. Q. 1810.

(b) This decision was affirmed in appeal in July 1813.

ON APPEAL FROM MONTREAL.

GEORGE SYMES - - - - - *Appellant.*

and

DANIEL SUTHERLAND, *Curator to*
PATRICK ROBERTSON's Vacant } *Respondents.*
Estate, and NEIL ROBERTSON, }20th April,
1811.

THIS was an appeal from a judgment of the Court of King's Bench, at Montreal, rendered in favor of the respondents.

Per curiam.

By the law of England where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm, (a) for a secret dissolution cannot discharge the partners. It must be promulgated to the world in the usual and ordinary way, by *particular* notice to all who have had previous dealings with the firm, and *general* notice to all who have not, through the medium of the Gazette. (b) The same rule obtains in the law of France, and so long ago as the year 1564. was recognized in a judgment of the Parliament of Paris upon a secret dissolution of a copartnership of the 20th Nov. of that year (c) reported

The dissolution of a partnership without particular notice to persons with whom it has been in the habit of dealing, and general notice in the Gazette to all with whom it has not, does not exonerate the several members of the partnership from payment of the debts due to third persons not notified and who contracted with any of them, in the name of the firm, either before or after the dissolution.

(a) *Parkin v. Caruthers et al*, 3. Esp. N. P. p. 248. *Willet v. Chambers*, Cowp. 814.

(b) *Graham v. Hope*. Peake's nisi prius. 154.

Godham v. Thomson. lb. 42.

Godfrey v. Turnbull, 1. Esp. N. P. 371.

(c) *Charondas Pandect*. lib. 4. c. 13. 2. *Bornier* 469. *Poth. Soc. n.* 157.

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 v.
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by *Charondas* ;—" Il faut" says this judgment, " que celui qui ne veut plus être associé fasse signifier à tous ceux avec lesquels il avait coutume de contracter ou de négocier pour le fait de la société, la dissolution d'icelle ; autrement il demeureroit obligé envers eux ; même qu'il la dénonce par proclamation et affiches publics à ceux qui lui sont inconnus."—It must not, however, be presumed that knowledge of the fact of dissolution acquired by other means is insufficient, for if there be an absolute knowledge of this fact in the party contracting with the firm at the time of the contract made it is enough. He can never be said to have contracted with the firm upon the faith of those persons whom he knew to be no partners in it, and consequently knew to be no parties to his contract.

In the present case as the plaintiff's agent (*Cuvillier*) by whom the sale was made, has been examined by both parties, and has distinctly sworn that he had no knowledge of the dissolution of the copartnership in 1801, or of Neil Robertson's having retired from the house ; the sole enquiry is whether such steps were taken at the time of dissolution or since, by the Robertsons or either of them, that notice to the plaintiff may fairly be inferred, and his want of the knowledge of Neil Robertson's having retired from the copartnership attributed to the plaintiff's laches ?—Now, the facts of this case as they appear in evidence, are these :—1. That there was no alteration in the style of the firm, and the fair inference is, that it continued to be composed of the same persons.—2. That regular notice was given to the creditors in England, and yet a similar notice was not given to the creditors here.—3. That no public notice of the dissolution was given

here or elsewhere.—4. That so late as March 1807. three of the principal merchants of Montreal had no knowledge of Neil Robertson's having retired from the partnership, although the dissolution took place as far back as 1801, and acquired their knowledge of this circumstance at that time by private and particular application to Patrick Robertson, on the behalf of some of the creditors of the house in England, to know who were the partners in the firm of Patrick Robertson & Co. Against such a weight of testimony notice to the plaintiff cannot be inferred, nor can we attribute the want of the knowledge of Neil Robertson's having retired from the firm to any other cause than to the laches of Neil Robertson and Patrick Robertson, of which they cannot avail themselves. A dissolution, it is proved, did take place ; but this is not a dissolution in point of law with regard to third persons unless they have been notified thereof. So far from the change being of public notoriety, upon which alone the question rests, we find that fact rebutted by the evidence. We have gone through the record more than once, and upon mature deliberation are clearly of opinion that the judgment of the court below must be reversed with costs, and that judgment must now be entered up for the plaintiffs for the sum demanded by the declaration.

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SYMES
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Judgment reversed.

BARNEY v. HARRIS.

June 10th,
1811.

Any irregularity in an affidavit to attach property cannot be taken advantage of by an exception as to form.

In case of any irregularity in suing out a "*capias ad respondendum*,"

a motion to discharge the defendant from the Sheriff's custody, for want of a sufficient affidavit to hold to bail, and not an exception as to form, is the mode of taking advantage of such irregularity.

IN this case an attachment was sued out against the defendant's property, but the affidavit being considered as irregular by the defendant, he fyled an exception as to form. It was argued for the defendant, that an exception as to form was the proper course of proceeding; and for the plaintiff, the contrary was maintained upon the authority of the case of *Patterson v. Hart. (a.)*

(a) In this case of *Patterson v. Hart*, determined in the Court of King's Bench at Quebec in 1811. the defendant was held to bail upon an insufficient affidavit, and an exception as to form founded on the irregularity of the proceedings in this respect, was fyled upon the return of the process. For the defendant it was maintained to be the most proper mode of taking advantage of the alleged irregularity: *sed*,

Per curiam. This exception must be dismissed. Every exception as to form is a "*fin de non procéder*," and must therefore shew that the Court cannot legally proceed on the plaintiff's demand or compel the defendant to answer to it in any manner, (vide the case of *Forbes v. Atkinson*, in 1810. K. B. Q.) Now a *capias ad respondendum* is two fold, it contains a summons which requires the defendant to answer the demand of the plaintiff, set forth in the declaration and annexed to the writ, and it directs the Sheriff to take the body of the defendant, and to keep him in his custody until he gives bail to the action. The exception pleaded in this case certainly shews that the defendant has been improperly taken into the Sheriff's custody, and that he is entitled to his discharge from that custody for want of a sufficient affidavit, but it does not shew that the Court cannot proceed in the cause before them, because it does not at all impeach either the regularity of the summons to answer, contained in the *capias*, or the form of the demand set forth in the declaration. It is the collateral proceeding to obtain bail or security, which is affected by the matter which is pleaded, and not the principal proceeding to obtain judgment for the sum demanded; and consequently the court can proceed in this action, as in all others instituted by summons.

A motion to discharge the defendant from the custody of the Sheriff, for want of a sufficient affidavit to hold to bail, is the proper course in such cases as the present.

Exception dismissed.

Per curiam. The pleading which has been called an "exception as to form," is not a *fin de non procéder* as to the *instance*, which every true exception to the form is. It does not shew that the court cannot compel the defendant to answer the demand, but on the contrary it shews that notwithstanding the allegations which it contains, the defendant must answer, for the objection which it urges relates merely to the security, which by virtue of the attachment has been taken to answer the demand, and not to the demand itself, or to any part of it. The case of *Patterson v. Hart*, is perfectly analogous, although the security there taken was upon a *capias ad respondendum*; and the principle for which the plaintiff now contends, although it was not decided, was fully recognized in the case of *Barlow v. Richardson*. (b)

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 BARNEY  
 v.  
 HARRIS.

Exception dismissed.

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GEORGEN v. McCARTHY.

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THE plaintiff had obtained a judgment against the defendant for the amount of an inland bill of exchange, of which he was the drawer, protested for non-payment, and upon a return of *nulla bona* the plaintiff this day moved for a *capias ad satisfaciendum*.

Oct. 2nd.  
 1811.

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 The drawer of an inland bill of exchange, is *quoad hoc* a merchant, and a *capias ad satisfaciendum* may be had upon a judg-

ment thereupon obtained against him under the ordinance 25. Geo. III. c. 2. § 38.

(b) K. B. Q. in 1810.

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Per curiam. A *capias ad satisfaciendum* in the terms of the Ordinance (a) may be had for the satisfaction of all judgments given in commercial matters, between merchants and traders. A foreign bill of exchange in the law of France, is considered to be an act of trading in money. (b.) The bill itself therefore, is a commercial matter, and the parties concerned in it must be traders; and upon these principles in this court, in the case of *Ewing Bowie v. Skinner*, (c) a *capias ad satisfaciendum* was awarded against Skinner, who was an officer in the army. We can-

(a) 25. Geo. III. c. 2. § 38.

(b) 2. Poth, 107.

(c) In this case which was determined in June 1809. the plaintiffs had obtained a judgment against the defendant, an officer in the army, upon a bill of exchange, drawn by him, in their favor upon London, and returned under protest for non-payment. A writ of *fi. fa.* was sued out against his goods and chattels, lands and tenements, upon which, the Sheriff having made a return of *nulla bona*, a rule for a *capias ad satisfaciendum* was obtained and served on the defendant, who did not appear.

SEWELL, CH. J. said that imprisonment after judgment for the satisfaction of all, and of any debts without distinction as to their nature, was originally the law of France, and herein it differed from the law of England. (Harbert's case, 3. Coke's reports, p. 12.) And this continued to be the rule in France, until the year 1254, when by the Ordinance of St. Louis it was abolished, except in cases of debts due to the Crown. (Vide *Traité du Domaine par Lefevre de la Planche*, vol. 3. p. 297.) By the 48th article of the Ordinance *de Moulins*, which passed in the year 1566. the old law was re-enacted, and the *contrainte par corps* was again allowed, in all cases and against all persons, after the expiration of four months from the day on which a copy of the condemnation or judgment was served upon the person against whom it was pronounced, (*Traité du Domaine*, vol. 3. p. 297.) The 57th art. of the Ordinance de Blois, afterwards exempted persons in holy orders from the operation of this clause, and ultimately by the Code Civile, certain other characters were also exempted, and it was enacted generally that the *contrainte par corps*, except in certain cases, should not be allowed. Says this Ordinance: "défendons à nos cours et à tous autres juges de condamner aucun de nos sujets par corps en matière civile, si non, et en cas de réintégration, pour délaisser un héritage en exécution des jugemens, pour stellionat, pour dépôt nécessaire, consignation faite par ordonnance de Justice, ou entre les mains des personnes publiques, représentation de biens par les sequestres commissaires ou gardiens, lettres de change, quand il y aura remise de place en place, dettes entre marchands pour faits de marchandises dont ils se mêlent." It was the intention of the framers of the Code Civile to have continued the liability of defendants to imprisonment in satisfaction of debts as it then stood, but the King intimating his desire that it should be abolished, a new title was prepared which is the 31th, as it now stands. (See the *procès ver-*

not see that there is ground for any distinction between an inland and a foreign bill of exchange, and there was none in France. (*d.*) The motion must, therefore, be allowed.

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ca. sa. ordered to issue.

hal des conferences on the Code Civile. p. 423 et seq.) This article is the 4th of the 34th title, and was the law of Canada at the conquest, the redaction of the Code Civile in 1678, having introduced it without change, and no alteration having afterwards taken place in it. By the law therefore, as it stood at the conquest and is recognized by the Quebec Act, which with great propriety may be called the common Law of Canada, this motion for a *capias ad satisfaciendum* or *contrainte par corps*, must be allowed, unless the plaintiff's right to it has been taken away by some Act of the legislature, subsequent to that event. Now the 14th. and 22nd. sections of the Ordinance 17. Geo. III. c. 2. and the 36th. 37th. and 38th. sections of the Ordinance 25. Geo. III. c. 2. are the only clauses of Acts passed since the conquest which bear upon this point. The 30th section of the Ordinance 25. Geo. III. c. 2. in the words of the 14th section of the Ordinance 17. Geo. III. c. 2. directs that the writ of execution in all cases, "shall set forth" the Judgment of the Court between the parties, and the kind of execution *which the law, according as the case may be, shall direct*, whether the same be to take the body or to levy a sum of money out of any one's goods and chattels, lands and tenements, or to do any special matter or thing whatever." But the reference here made, being to the law generally and not to these ordinances particularly, it cannot be said that the provisions of the 4th article of the 34th title of the Code Civile, (which at the passing of the ordinance 17. Geo. III. were certainly in force,) have been abrogated by this clause. Then as to the remaining clauses of these ordinances, the 21. sec. of the 17. Geo. III. c. 2. and the 37. of the 25. Geo. III. c. 2. enact "that if the defendant shall convey away or secrete his effects, or shall with violence, or by shutting up his house, store or shop, oppose his effects being seized, *an execution shall go against his person.*" And the 22nd sec. of the 17. Geo. III. c. 2. and the 38th sec. of the 25. Geo. III. c. 2. enact, that "an execution against the person of the defendant, shall issue for the satisfaction of all judgments given in commercial matters between merchants or traders, *as well as of all debts due to merchants or traders for goods, wares and merchandize by them sold,*" and upon these sections it is only necessary to observe that they restore the ancient law, and plainly extend instead of abrogating or restricting the provisions of the Code Civile.

On these grounds we hold the 4th article of the 34th title of the Code Civile to be yet in force, and therefore, because the *contrainte par corps* is thereby allowed upon foreign bills of exchange, and because also all such bills are by law considered to be commercial matters, 2. *Pothier contrat de change*, no. 27. p. 107, and the parties to such bills in the light of merchants or traders, (which brings the case within the very words of the 38th section of the Ordinance 25. Geo. III. c. 2.) we are of opinion that a return of *nulla bona*, which the ordinances require, having been made to us, and no cause being shewn against the present motion, the plaintiff is entitled to a *capias ad satisfaciendum*.—Rule absolute.

(*d.*) Cod. Civ. Tit. 34. art. 4—5, L. C. Den. v. *Contrainte par Corps*, 447.

JONES, *Curator*, v. McNALLY.

October 8th,
1811.

Misnomer
cannot be
pleaded by an
exception as
to form.

THE defendant in this case pleaded misnomer by exception as to form.

Per curiam. Misnomer is not the subject of an exception as to form. It must be pleaded by a temporary exception as it is in England by a plea in abatement. An exception as to form is merely a preliminary plea, and corresponds to the special demurrer of Westminster Hall. It has reference, not to the parties or to the subject matter of the action, but to imperfections, defects and want of legal form in the writ or return, in the libel, or in the conclusions of the declaration. An exception as to form is of the class of *fins de non procéder*, and consequently impeaches, directly or indirectly, the jurisdiction of the court,—“*Ils n’attaquent que les juridictions*,” (a) and its object is to shew that some step which the law requires *d peine de nullité* in all causes and between parties of all and any description, has not been observed in the particular case before the court; so that not being legally possessed of the suit, the court cannot proceed in it, “or inquire into any question relating either to the parties or to the matter in dispute.” A plea of misnomer, on the contrary, has reference not to the court but to the parties, puts the right of action in

(a) Serpillon. 54.

issue, not indeed with respect to the subject matter of the suit, but in relation to the parties. Its object is to shew, that in the particular case before the court, the plaintiff cannot have any right of action against the defendant, because the latter, though regularly summoned and formally complained of, is not the person named in the declaration, and consequently is not the person who, by the plaintiff's own shewing, is his debtor; and therefore, he avers that the plaintiff cannot, *at this time*, have or maintain his action against him the defendant, for or by reason of the matters or things in the said declaration set forth :—thus admitting according to the fact, if there be no exception as to form on other grounds, that he has been formally and regularly brought into court, and consequently admitting that the court notwithstanding the misnomer is legally possessed of the suit. For these reasons the exception as to form which has been fyled in this cause must be dismissed.

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Exception dismissed.

DORVAL v. L'ESPERANCE.

A WRIT of *Fieri Facias* had been issued returnable on the 1st day of February, 1812. The Sheriff

October 9th,
 1811.

If an application be made to compel the Sheriff to return a

Writ of *Fieri Facias* before the day fixed for the return in the body of the Writ, the Court will not grant the application if there be no evidence to shew that the Sheriff has actually been guilty of some neglect or omission.

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 ~~~~~  
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having levied the amount and no opposition "*à fin de conserver*" having been fyled on behalf of any of the creditors of the defendant, *Vanfelson* obtained a rule on the Sheriff to return the writ *nisi causa* this day. (a)

*Plamondon*, contra, contended that the Sheriff could not be compelled to make any return before the return day. That he might, if he chose so to do, pay over the money as soon after it was levied as he thought fit, but that it was at his own proper risk, and that in England it was held that the money ought to be brought into court. (b) The Sheriff is aware that no oppositions "*à fin de conserver*" have been filed, but he cannot say whether the defendant is solvent or insolvent, nor how many oppositions may be filed before the 1st day of February.

*Per curiam.* The question for our determination is, whether the Sheriff can regularly be called upon, by rule, to return a writ of *Fieri Facias* before the day fixed for the return in the body of the writ ; for, although the object of the plaintiff is to compel the Sheriff to pay over to him the amount of his debt and costs which the Sheriff (as he alleges in argument) has realized by the sale of the defendant's moveable property,—the motion is for a rule to return the writ and no more, and the only answer to the motion is that the writ is returnable on the first day of next term.

By the 20th art. of the 33rd title of the Code

(a) 6. Bacon's Abr. Sheriff, letter N. 178.  
 5. Burn's Jus. v. Sheriff, and 3. Salk. 323.  
 (b) Viner Sheriff, let. A. 434.  
 2. Tidd's pr. 928.

Civile, the *huissier* was directed to pay over to the plaintiff the amount which he levied on the moveables of a defendant as soon as they were sold ; but it must be remembered that the courts, when this country was subject to the Government of France, did not sit in terms ; and that the *huissier* had no writ of execution commanding him to bring the money into court on a specific day, but proceeded entirely on a copy of the judgment authenticated by the seal of the court. The direction of the Code Civile is, consequently, no longer applicable, and we must necessarily take our rule from the experience and practice of the courts of Westminster Hall, from whence the Legislature has adopted the system of courts sitting in terms, and the principle that judgments must be executed by the authority of the King's writ. The parties have so considered the question and referred us to English authorities, of which the most recent states, " that the Sheriff, on the return day of the *Fieri Facias*, may be called upon by rule to return the writ." (a) And this is strictly consistent with the decision in the case of *The King v. The Sheriff of Cornwall*, (b) in which a rule calling on the Sheriff to return a writ was declared to be irregular, and set aside, because it had been taken out as a side bar rule in the preceding vacation. On this occasion the court observed " that a rule calling on a Sheriff, to return a writ presupposes some neglect on his part, and consequently should not issue until he has *actually* been guilty of some omission ;" and in this case we have no evidence of any neglect or omission, or of any act whatever contrary

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(a) 2. Tidd's pr. 928.

(b) 1. T. R. 552.

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to the command of the writ. The Sheriff, if there be no impediment by oppositions, may pay and may return that he has paid the money levied on a *Fieri Facias* to the plaintiff, (a) although in strictness the money ought to be brought into court as the writ requires. But this must be done at his risk, and if he does not do so, we cannot rule him on this account to return the writ before the return day.

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EXPARTE FREDERICK GRANT and JOHN GREENSHIELDS.  
*On a Petition against JOSEPH PLANTE', a Notary.*

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October 19th,  
 1811.

If a paper writing, contained in a sealed envelope, purporting to contain an holograph will, be opened by a Notary Public and retained by him after the

decease of the testator ; such notary cannot keep it on record in his office, but must produce the same before a Judge, that probate may be made, and the will is then to remain deposited with the records of the Court of King's Bench.

A Notary Public has no authority to unseal an holograph will unless in the presence and by the order of a Judge.

An holograph will of personal and moveable property is valid, by the Law of England, and Probate may be made thereof according to the Prov. Stat. 41, Geo. III. c. 4.

(a) 2. Show Rep. 87. Rex. v. Bird. 2. Lev. 204 4. Bacon's Abr. fo. 460.

the following indorsement :—" Mr. John Patterson's " private papers to be opened only in the event of his " decease, Quebec, 14th Novr. 1809." and conceiving it to be his will and not choosing to open it without witnesses they sent for a notary, Joseph Planté and two other persons, and in their presence, at the request of the petitioners, the packet was opened by the notary. It was found to contain an holograph Will dated, signed and entirely written by the deceased with articles of the several copartnerships in which he had been concerned. The will consisted of several bequests of sums of money to divers persons, without any devise or testamentary disposition of any description as to immoveable property of any kind. The notary, after perusal of the will, caused it to be " paraphed" *ne varietur*, by all the persons who were present, and having drawn up a regular *procès verbal* of the proceedings, in which it was declared that, at their request, the will was placed " en dépôt au rang de ses minutes, pour leur en être delivré et à qui il appartient, toutes expéditions nécessaires." He took the will into his possession and custody. The object of the petition was to compel the notary to deliver up the will and to fyle it in the office of the prothonotary of the court of King's Bench, in order to obtain an efficient probate of the will for the immediate purpose of recovering the outstanding debts due to the late copartnership of Patterson, Grant & Co. The parties were heard early in the term, when the court observing that it was necessary to have copies of the will and of the *procès verbal* of the opening of the will, and of the subsequent proceedings before them, ordered that, at the expense of the petitioners, Planté

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should fyle such copies in two days, and that he and the petitioners should be again heard. The copies being fyled, the parties were this day finally heard.

For the petitioners it was urged that what was now asked had been largely considered in the application made by the heirs of Duchesnay, in this court, for the same purpose as the present. (a) The court had in that case determined, that an holograph will which the heirs of the testator had permitted a notary to take possession of and to place among the minutes of his notariat after the testator's death, could not remain there, and the notary was ordered to deposit the original in the hands of the officer of this court. The principal object in the case of Duchesnay, and in this case, was to obtain a legal probate of the will, and in the case of an holograph will, not placed *en dépôt* in the office of a notary by the testator personally during his life, an efficient probate could only be obtained in this court. The will as it stood, was totally unauthenticated. It was not the notary who had found it among the papers of the testator. The copartners of the testator had, indeed, delivered it to him declaring they had so found it, but not upon oath, nor was there at present any evidence whatever, that the will or the signature to it were of the handwriting of the testator. Messrs. Grant, Greenshields, Mure, and Robert Patterson had all declared that they were of the testator's handwriting, but again, not upon oath. The certificate of Planté would prove therefore, that the will was said to have been found among the papers of the late Mr. Patterson, and was said to be of his handwrit-

(a) Determined in K. B. June Term, 1807.

ing ; but it could prove no more, and the will being totally unauthenticated it must remain in that condition until it should be proved before one or more of the Judges of this court and deposited in the office of the prothonotary under the 2nd. sec. of the Prov. Stat. 41st, Geo. III. c. 4 ; when a certified copy will have the same effect as if it had been proved in a court of probate and will be received in England, but not otherwise.

On the part of Planté it was contended, that it mattered not by whom the will had been placed *en dépôt* in the hands of Planté, that being once possessed of it *à titre de dépôt*, he was authorized by law to retain it, and that it could not therefore, legally be taken from his notariat. (a) As to the probate, it must be made, in the way that all other acts " sous seing privé " when placed in a notary's minutes are to be proved, by "*expers*" and by "*comparaison d'écriture*," when contested and not before. The persons interested in the will, in this case, Messrs. Grant and Greenshields, have acknowledged it to be of the handwriting of the testator. If his heirs are absent, a curator may be appointed, and if he sees fit to impugn the will, he will do so, and it will then be time enough to prove it. It was insisted, therefore, that if the will should be brought into court, it must, after probate, be returned to the notary as he could not, consistently with the law of the country, be deprived of any writing which had been deposited in his custody. What he so receives is a matter of record, and a record, once made, cannot be changed. As to the argument that a will without

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(a) 2. Parf. not. 180. 4 Grand Commun. 89. Deniz. Verb. " Scellé."—  
12. Rep. de Jur, 203.

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probate in a court of law would be of no avail in England, it was unfounded. Every act is considered according to the law of the country in which it is done.—By that the form in which it is executed is directed, and by that form the validity or insufficiency of every act must every where be decided,—there can be no other criterion.

In reply was urged the absolute necessity of the previous probate in all cases where such can be had, for the protection of executors in their duty, and of debtors in their payments to executors, and to prevent any unnecessary authenticity of an holograph will, which according to the argument on the other side, might be raised in every case. That there could be no such thing as a probate before a notary because a notary has no power to administer an oath and that it seemed, therefore, to be unquestionable that all probates should be made in this court, because then they are efficient. That in the case of Duchesnay it was admitted that a sealed will could not be opened without the presence of a Judge, yet, that in this case, although the will was opened without the presence of any Judge, it was contended that all the proceedings were regular, so regular that Planté's right to the custody of the will is placed beyond all doubt. This, therefore, should have been distinctly shewn by authorities, particularly as the decision of this court upon the very point was directly against it, the Judges having decided that the opening of Duchesnay's Will, without the presence of a Judge, was an act contrary to law and to the duty of the notary.

SEWELL, CH. J. The paper writing mentioned in the *acte de dépôt*, which has been filed, is presumed to

be the will of John Patterson, but it is not yet proved to be such. It however purports to be his will. It remained, as it appears, in his possession until the hour of his death. It was found sealed up among his papers after his decease, and by the notary, Planté, was opened without the authority of a Judge, and Planté insisted upon his right to retain it under these circumstances. This is the case.

Now it is certain, that being sealed the notary had no authority to open the packet which contained it but in the presence and by the order of a Judge.— This was the Roman Law unquestionably ; and although there does not appear to have been any positive law in France, upon the subject, yet such was the practice in that kingdom, and particularly in the Châtelet de Paris, (a) in all instances of holograph wills and, according to *Jousse*, of “testamens solennels” executed before notaries, (b) all persons interested in the will, being competent to apply for its being so opened. (c) The opening of the sealed packet containing the holograph will in this case was consequently an illegal act on the part of the notary, and as no legal right can flow from any illegal act or assumed authority, it follows, that the notary’s pretension to retain the will is unfounded, and the case of *Duchesnay’s* will, which has been cited in this respect, is expressly in point. There has, in fact, been no dépôt of the paper in question, because there was no authority in any of the parties concerned in the opening

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(a) Actes de notoriété du Chât. de Par. of 20th March, 1708.—2. Barde 179. col. 1.—4. Henrys 456. 457. Nos. 40. 41.—2. Fig. 283.

(b) 1. Traité de l’administration de la Justice 211. No. 99.

(c) 4. Henrys 457. n. 41.

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of the will, to make any disposition of it. It was a Judge, and a Judge only, who could order it to be deposited in any other place than that in which it was found, and it was his duty to point out the officer in whose custody it should be placed. (a) For, admitting that under the law as it formerly stood, it was necessarily a notary, and only a notary, in whose custody it could be placed, it was nevertheless the Judge who was to name him; and he was authorized to appoint such notary as he might see fit to select for the purpose, this was the constant practice of the Châtelet. "Il (M. le Lieutenant Civil) rend, une ordonnance, portant que la minute du testament, s'il est olographe, sera déposée à un notaire *qu'il nomme* et qui s'en charge en conséquence." (a) The matter is, therefore, before us as if the will had now been opened in Court, and it remains for us,—exercising a sound and legal discretion,—to determine how the Probate of this will shall be made and in whose custody it shall be placed. The Quebec act, 14, Geo. III. c. 83. introduced into Canada the form of wills, prescribed by the Law of England, and from that period all wills which have not been executed before notaries, have been proved in the Courts of civil jurisdiction in the several districts before one of the Judges and have then been deposited of record. The Prov. Stat. 41, Geo. III. c. 4. s. 3. declares that doubts had arisen touching this method of proving last wills and testaments, made and executed according to the forms prescribed by the laws of England, before one or more of the Judges of the Courts of Civil Jurisdiction in

(a) Actes de notor. 337, 338. and 339, note (a)

this Province, and it, therefore enacts that such proof shall have the same force and effect as if made and taken before a Court of Probate. Here the will is merely a will of personal and moveable property, and consequently in its form is a valid will according to the forms prescribed by the law of England. (a) The probate, therefore, of this will in this Court will be strictly proper and valid under the Statute; and as it clearly appears to us, that a Probate so made will be more beneficial to the parties who are interested in the will than any other course which we can direct,—and to say the least, is equally legal,—we cannot do otherwise than order that the will be proved in this Court, where, of course, after Probate, it must necessarily be deposited, not only because in all Courts of Probate this is done, but because this is the “method” which, in similar cases, has hitherto been followed in this Province and is recognized by the Provincial Statute 41, Geo. III. c. 4.

The Court accordingly makes the following order :—that Joseph Planté, notary, do exhibit and deliver in the office of the prothonotary of this Court, on Thursday next, at the hour of ten in the morning, unto one or more of the Judges of this Court, the will and testament holograph of John Patterson, late of the city of Quebec, merchant, deceased, dated the 13th Nov. 1809, and mentioned and described in the act intituled, “*Dépôt du Testament olographe de feu M. John Patterson,*” in this Cause fyled by the said Joseph Planté, and therein mentioned to have been received from Frederick Grant and John Greenshields,

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merchants and late copartners in trade with the said John Patterson, on the 17th day of Sept. now last past in a certain envelope of paper sealed: and it is further ordered that Probate of the said will and testament holograph of the said John Patterson be then and there made before one or more of the Justices of this Court in due course of law, and that such Probate being so made, the said will and testament holograph of the said John Patterson do therefore remain deposited of record in the office of the prothonotary of this Court to and for all legal interests and purposes whatsoever. (a)

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WILLIAM FISHER SCOTT *against* WILLIAM LINDSAY.

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Octr. 20th.  
 1811.

Where a person contracts as a public officer, he is not personally responsible, without some peculiar cause to charge him.

IT appeared on the trial of this case, that the defendant, being clerk of the Assembly, had employed the plaintiff as a writer during a Session of the Provincial Parliament in copying the Journals. No special agreement had been entered into by the parties, and it was admitted by the Counsel on both sides, that it was a question of evidence and no more.

*Per curiam.* An individual in a public office certainly may, by his contracts for public services, render

(a) See the Ordon. of M. le Lieutenant Civil in the Chatelet of Paris of 13th Feb. 1668. against Faudoire, a notary, enforced by an attachment against the body on the 21st of the same month.

Actes de notor. note (a) coll. 2. p. 338.

The will in obedience to this order was proved and deposited as it directs.

himself personally liable, but where he has plainly acted as a public officer, he cannot be personally liable unless there is some peculiar cause to charge him. In this case it is in evidence, that the plaintiff knew that the defendant contracted with him as an officer of government, and that he looked to government for his reward. The account which he delivered to the defendant is headed "Government to William F. Scott, Dr." and this of itself is a distinct admission on his part, as to the character of his agreement, that it was not personal but official. The defendant, therefore, cannot be personally answerable for the sum which the plaintiff may have earned. As to the principle on which this decision is founded, the law of England and the law of Canada, are in perfect unison. (a.)

Action dismissed.

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ASTOR v. BENN, BUCHANAN AND HEATH.

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THE defendants drew at Quebec, a bill of exchange on Buchanan and Benn of Liverpool, in England, in favor of Proctor & Froste, of Montreal. By Proctor & Froste this bill was indorsed, in Montreal, to the plaintiff, a merchant of New York, and by him indorsed

April 20th,  
1812.

The drawer of a bill of exchange is liable to the damages provided by the laws of the country in which it is drawn, and to no other.

(a) Vide the cases referred to in 1. Comyn on contracts, p. 272. Œuv. de Cochin, vol. 5. p. 760.



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at New York, to Strong & Dewis, merchants of that city. The bill was afterwards protested for non-acceptance and non-payment, and returned to Strong & Dewis, who thereupon demanded and received from the plaintiff the principal and interest of the bill, with twenty per cent damages, according to the law of the State of New York,—in ordinary cases of protested bills: and the question in this action was, whether the defendants were responsible to the plaintiff for any more than the amount of the bill in principal and interest, with ten per cent damages, according to the Provincial Ordinance 17. Geo. III. c. 8. § 1.

SEWELL, CH. J. The contract between the original parties to a bill of exchange, is to be construed by the law of the country in which it is drawn, (a);—whatever is there determined to the the prejudice of the drawer he must abide by, and by the same rule he is entitled to all that is thereby allowed to his benefit. The payee and every subsequent indorser knows, from the face of the bill, where it was drawn, and each is bound to know the law of the original contract, since every man, at his peril, must take cognizance of the law of the country with which he corresponds, and has dealings, otherwise there would be an end of trade. (b.) When a bill of exchange is negotiated through a foreign country out of the direct course, it is an act in which the drawer does not participate if there be no special agreement. (c.) And if it be indorsed in such

(a) Chitty on bills, 78.—1. B. and P. 141. 3 Ves. jr. 447. 2, H. B. 603. Cowp. 174. Burr, 1077. 1, H. B. 126. 7, T. R. 242. 1, T. R. 10. 5, East 130. Ambler, 672-676. 2. Bornier, 629. Note on art. 56.

(b) Ambler, 675.

(c) Jurisp. Consul. 397. No. 7. Glen on bills of exchange, 239.—141. Ferguson v. McDonald, K. B. Q. This case was decided in February

foreign country, as every indorser is considered in law a new drawer, it becomes, in fact, a new bill, and by the indorsement a new contract is formed between the indorser and his payee, which is also to be construed by the *lex loci*, by the law of the country in which it is so indorsed. (d). It is certain moreover, that where the law of a foreign country so clashes with the rights of the subjects of our own, that one or the other must necessarily give way, our own is entitled to the preference, "this" says Lord Ellenborough, "has been long settled in principle, and is laid up among our acknowledged rules of jurisprudence." (e.) Upon these grounds we are of opinion that *ten* per cent damages in case of protest, were the terms of the original contract between the drawers and their payees, Proctor & Froste, in consequence of the Ordinance 17. Geo. III. c. 3. as fully as if it had been so agreed by express stipulation; that Proctor and Froste by their indorsement could convey to their indorsee, the plaintiff, no more than the rights which they themselves held according to these terms, and that the indorsement at New York, has not varied the original contract so as to affect the rights of any of the antecedent parties to the bill, and

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1803. *Coram*, ELMSLEY CH. J. and damages at twenty per cent were allowed, because it had been expressly agreed between the drawer and the payee that the bill should be negotiated through New York. *Vide* Poth. Change, No. 67.

(d) 2. Burr. 674. 1, Str. 441. That which discharges a debt in the country where it was contracted is a discharge of it in every other place, *Ballantine v. Golding*, 4. T. R. 185. n. *Potter v. Brown*, 5, East, 130. *Ten* per cent damages was a part of the original debt. *Ambler* 672-675. and the undertaking to pay that quantum of damages being the original contract, payment of the bill in question in principal and interest with damages at ten per cent, would seem consequently, to be a discharge of the whole debt in Canada, and every where else. *Vide* *Warder v. Arrell*, Washington's reports, 282. and *Powers v. Lynch*, 3. Massachusetts Rep. 77. as cases wherein the American courts had admitted this principle.

(e) 5. East, 130.

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judgment must accordingly be entered for the amount of the bill with interest at six, and damages at ten per cent, as directed by the Ordinance. (a.)

BALDWIN v. GIBBON, and McCALLUM, *opposant*.

June 19th,
 1813.

A builder's privilege upon a ship, of his own construction, is lost if he delivers her to the owner and suffers her knowingly to be sold at public auction to a third person without opposition.

The Code Marine, if it even was in force, was no part of the common law of Canada, but a part of the public law, and conse-

quently superseded by the effect of the conquest; and if it was law in the Admiralty jurisdiction alone, whether it was public or common, the introduction of the English Admiralty law abolished it.

IN October 1811, Baldwin, a ship builder, instituted the present action by a writ of summons, and obtained judgment against Gibbon, the defendant on the 14th April 1812, for a balance of £110, due for the construction of a new ship. Pending the action,—the ship which before the action was commenced, had been delivered by Baldwin to Gibbon,—was transferred to him by a regular bill of sale, and enregistered in his name. A writ of *fieri facias* was issued upon the above judgment against the property of Gibbon, and the ship being seized as such in the possession of McCallum, the latter by an opposition *à fin de distraire* laid claim to the ship. On the other hand Baldwin insisted that she was still the property of Gibbon, and if she was not

(a) In an action brought on a bill of exchange drawn by J. S. Crawford, at Quebec, upon, and accepted by the defendant in England, it was held by Lord ELLENBOROUGH, that the acceptor of a foreign bill of exchange is not liable for re-exchange, nor for more than the principal sum, together with interest, according to the legal rate of interest where the bill is payable. Woolsey v. Crawford, tried at Guildhall the 28th May 1810.—2. Camp. N. P. C. 445.

then, that he as builder had a particular *lien* or privilege *réel* upon the ship, that she had been sold subject to his *lien*, and by him therefore, upon the principle of the *droit de suite*, might be seized and sold for the payment of his privileged debt.

SEWELL, CH. J. The sale of the ship by Gibbon to McCallum was before judgment, and after the delivery of the ship by Baldwin to Gibbon, and was publicly made. The transfer in point of form is correct, and the ship has been duly enregistered as the property of McCallum. None of these proceedings are impeached on the score of fraud or on any other ground: the whole of them had taken place, with the knowledge of Baldwin, and without any opposition or interference on his part, and there is no allegation that Gibbon is in a state of *déconfiture* (bankruptcy.) There is no pretence for saying that the ship is the property of Gibbon. The only question therefore, for our enquiry, is whether Baldwin is entitled to his particular *lien* or privilege (a) upon the ship, under the circumstances of this case; for, although a ship builder has for a *bona fide* debt a privilege *réel* upon his work, yet he may forfeit and lose this privilege by his misconduct. It has been contended that this privilege of a ship builder continues after a sale by the debtor, and until the ship has performed one voyage; and to prove this assertion, the Ordinance *de la Marine* of 1681, (b) has been cited and relied upon, and it has been said that this

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(a) A particular or specific lien according to the law of England and Scotland, is called in the law of Canada, a "privilege réel."—Vide l. Pigeau, 681. It is the right of retention enjoyed by a party to a contract, concerning moveable property, till indemnified for labor.

(b) Valin, Ord. de la Marine, Tit. x. art. 2. liv. 2. p. 602.

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Ordinance was received as law in the Court of Admiralty (in Canada,) before the conquest. But admitting this to be the fact, and that it was even enregistered in the Sovereign Council of Quebec, it is clear that it formed no part of the common law of Canada, and that it must have been received in the admiralty as a part of the public law, (c) in which case it was superseded, as well by the tacit effect of the conquest, (d) as by the introduction of the law of the admiralty jurisdiction of England, by the King's Commission of Vice Admiral to the Governor (Murray,) in 1764, and the subsequent establishment of the Court of Vice Admiralty. (e) These points have been discussed and decided in this court, (f) and it follows that the provisions of the Ordinance *de la Marine* by which a ship, notwithstanding a transfer by sale, continues bound and liable for the payment of all debts with which she was previously charged, until a voyage has been completed, (g) have no bearing upon the question before us, and that Baldwin's claim to a "privilège réel" upon the ship is no more than the claim of any other creditor, entitled to a particular *lien*, upon moveable property, ships being moveables, (h) and as it is certain that creditors of this description lose their privilege

(c) Ferrière D. D. v. Amirauté.

(d) 3. Cochin, 435. Vattel, liv. 3. c. 13. sec. 198. Dunod, Prescription, ch. 5. Jour. des Aud. p. 12. vol. 5. 2. L. C. Den. v. Artois, p. 348. 5. D'Aguesseau, 392-400. Marriot's Rep. p. 28. 5, East's Rep. p. 131. Sal-keld, 411. See also Lord Stowell's judgment in Ruding v. Smith, reported in the Annual Register of 1821. vol. 63. p. 400.

(e) Mazeres Coll. of Quebec papers, p. 19.

(f) In the case of Wompré v. Lyon, K. B. Q. 1806.—And that of Fraser v. Hamilton, *ante* p. 34.

(g) Tit. 10. lib. 2. art. 2. p. 603 On this article and as to when a voyage was performed, see Pandectes Françaises, vol. 19. p. 395.

(h) 1, Valin, liv. 2. tit. x. art. 1.—p. 601. Brodeau, sur art. 90. of Cnst, of Paris n. 4. Ferrière on art. 90. n. 14. Duplessis, Tr. des meubles, p. 135. 19. Pand. Fran. 381.

when they relinquish the possession of the moveable upon which it is charged. (a.)

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McCLURE *against* SHEPHERD.

October 20th,
1813.

THIS was an action to recover a certain quantity of timber belonging to the plaintiff which had been seized

The Sheriff having seized by attachment a large quantity of timber

and appointed a single guardian to take charge of the whole, in whose absence, during a sudden storm, a proportion of the timber, not being moored, or otherwise secured, went adrift and was lost;—held that the Sheriff was guilty of ordinary neglect and responsible for the loss.

Also, that the Sheriff might have employed as many persons as were necessary for the security of the timber, and have demanded of the plaintiff at whose suit the timber was seized, in advance, the sums required for this purpose; and in case of refusal, would have been exonerated from the charge and custody of the timber. (b)

(a) 2. Den. p. 300, n. 4. 2. Ferr. D. D. Privilège, 427. 2. Bourjon, 679. No. 18. and 691. No. 88. Ambler. 252. 1. Burr. 494. 1. East. 5.-1. Atk. 234. Doug. 101.

In the case of *Wells v. Osman*, 2, Lord Raymond's Rep. 1044. it was said *per curiam*, when the builder trusts the contractor so far as to let the seamen go on board, there is no reason to help him.

Note.—To justify the retention of moveable property the following points must be established in evidence: 1°. Actual possession,—constructive possession is not sufficient;—Bell's Comm. 476. 2. Den. v. "Facteur" p. 300. 3. T. R. 119. 783. 1, East 5.—2°. That the possession enjoyed is legitimate, 3. T. R. 406. 417. 3, Bro. Ch. Cases. 571. Bell's Comm. 476. It is therefore held that the possession of goods obtained by an informal attachment cannot be retained, Bell's Comm. 477.

(b) The earliest case relating to the liability of Sheriffs, in civil matters in Lower Canada, whereof any trace is to be met with, is that of *McAuley v. Shepherd*, argued and decided upon an appeal from this Province before His Majesty in his Privy Council in the year 1787. The case was argued, on the part of the Sheriff, appellant, by the late Master of the Rolls, Sir WILLIAM GRANT, and the following is an abstract of the grounds of the judgment in the Privy Council as contained in a letter from him to his client the Sheriff, announcing the reversal of the judgment of the Court of

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by the defendant, as Sheriff of the district, in virtue of a writ of *arrêt simple* issued at the suit of one Mary Barrows. The plaintiff declared that after the return of the said writ, *main levée* had been granted of the seizure, and the defendant ordered to deliver the timber to him, which he had refused to do.

The defendant pleaded first, the general issue. Secondly, That on the eighteenth day of July, 1810. the said timber was by the irresistible force and violence of the winds and waters carried away; and,—save and except a certain portion thereof in the said plea specified,—was altogether lost and destroyed, without any fault or negligence on the part of the said defendant. That the said defendant thenceforward to the time of fying the said plea had used great diligence, and incurred great and heavy expences, in recovering and saving as much of the said timber as was possible; and had recovered and saved for the plaintiff a part thereof, to wit, &c. that the monies by him laid out and

Appeals here, and the dismissal of the action against him :—" The Lords at the Board of Privy Council adopted as the grounds of reversal, very nearly the same reasons as are stated in our case. Lord CAMDEN said, that it was of great consequence that men should know, with precision, under what law they are acting. The laws of Canada being, by the Quebec Act, made the rule of decision in all civil cases, no part of the law of England would operate there, except in so far as it may be clearly and expressly introduced by an ordinance of the Province. To say that the bare mention of the word Sheriff in an ordinance should have the effect of introducing the whole body of English law relative to that office was absurd.—That officer existed before the ordinance passed, and had a duty to execute under the criminal law of England. If the ordinance had been silent he would have had nothing to do with civil process under the law of Canada. It is the ordinance that gives him the execution of civil process, and further than it charges him he cannot be liable. If it was intended to adopt the law of England with regard to escapes it ought to have been done in clear and unambiguous language;—that the officer might have known whether he would accept of the office under such conditions.—Sir LLOYD KENYON acceded to this, and in addition laid some stress on your not having the appointment of the gaoler. The rule *respondet superior* supposes the gaoler to be the Sheriff's servant which he was not in this instance.

expended in and about the salvage of the said timber amounted to a large sum, to wit, to the sum of £300. That the said defendant had a special *lien* and privilege on the said timber, and had a right to hold and detain the same until as well the said sum, as his lawful fees were paid to him. The third plea was the same as the second omitting all that is therein stated respecting the salvage. It appeared in evidence that upon the seizure made by the defendant, he appointed a single guardian to take care of the whole, and in the absence of the guardian, a proportion of the timber,—not being moored or otherwise secured,—went adrift during a sudden storm, and was lost, and that the timber was afterwards, by judgment, declared to be the property of the plaintiff McClure.

SEWELL, CH. J.

It is generally true that every bailee of property is responsible for a loss by accident or force, if it be occasioned by a degree of negligence for which by the nature of his contract he is answerable; (a) and as a general principle it may be said that every public officer is answerable for the acts of his own ministers and servants. (b) By the common law of Canada the *huissier* was merely the seizing officer. It was the guardian, who was appointed by the *huissier*, who had charge of the property seized, and the *huissier* was not responsible if he named for guardian a person solvent in general repute. (c) The law in this respect is now materially changed, all writs are addressed to the She-

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(a) Jones on Bailments, 122.

(b) Coquille. Quest. 215. Poth. Dépôt. No. 111. vol. 2. p. 839.—2. T. R. 148.

(c) 2. Poth. Dépôt. 830. Nos. 91-92-93.—1. Pigeau 624. Jousse C. C. vol. 1. 406. Serpillon 624.

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riff, and it is enacted by the Ordinance 27, Geo. III. c. 4. § 11. "That if upon an attachment security is "not given, the goods shall remain attached and held "by the Sheriff," so that the Sheriff is now the detaining as well as the seizing officer, the guardian as well as the *huissier*. Now the guardian was answerable for ordinary neglect or *faute légère* (a) and consequently the Sheriff, if he is now the guardian, must be answerable to the same extent; for there is at least the same reason for his responsibility, perhaps more, since the plaintiff has not now the choice of his *huissier* or guardian as he formerly had. (b) It has been argued that the Sheriff cannot be deemed a guardian and that he is a *séquestre*, but this does not vary the case, both are equally answerable for ordinary neglect. (c) *Pothier* considers the contract in either case rather as a contract "*de louage*" as it is not a gratuitous contract. (d) Then, in point of fact, the neglect of the Sheriff's officer, and of the Sheriff in this case, amounted at least to ordinary neglect; (e) and it was the less excusable, because the rights of a guardian being vested in the Sheriff, he might have employed as many persons as were necessary for the security of the property, (f) and he might have demanded of the plaintiff an advance of the sums required for this purpose, and in case of refusal would have been exo-

(a) 2. Poth. Dépôt, Nos. 91-96. Den. L. C. Gardien, § 4. n. 2. vol. 9. 239. Serpillon 632. Rep. de Jur. 8vo. vol. 24. p. 404. v. *faute*.

(b) 24. Rep. de Jur. 8vo. 381. Poth. Dep. 116. and 111. 8. L. C. Den. p. 418.

(c) Poth. Dépôt 90-98-171. See also Erskine's Instit. 405.—1. McDouall Ins. 377.

(d) Poth. Dépôt, Nos. 90-91-98.

(e) Jones on Bailments 22.—8. L. C. Den. 442. 24. Rep. de Jur. 8vo. 400.

(f) 9. L. C. Den. 234. Gardien, No. 4.

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nerated from the charge and custody of the timber. (a)  
Upon these grounds judgment must be entered for the plaintiff, the defendant ordered on a day certain to deliver to the plaintiff the timber remaining in his possession, and the value of the deficiency estimated by "*experts*" to be hereafter named according to the usual practice of the court. (b)

## Judgment for the plaintiff. (c)

(a) 2. Jousse 297. C. C. Tit. 33. art. 10. not. 2. L. C. Den. "Gardien," § 4. No. 4. 1 Pig. 640. No. 7.

(b) See. Poth. 4. 486. L. C. Den. expert. § 2. art. 5.—2. Jousse C. C. 296.

(c) Two appeals were instituted from this judgment—first, to the Provincial Court of Appeals, and secondly, to His Majesty in his Privy Council, and on each appeal the judgment was affirmed.

It should be observed that since the decision of this case a temporary Statute, 9, Geo. IV. c. 6. § 9. has enacted, "That in the service and execution of writs of summons, of execution and other civil process, the custody and safe keeping of goods and chattels under seizure, and the receipt, safe keeping, and payment of all monies by them levied under any writ or writs of execution, the several Sheriffs and Coroners in this Province, shall be liable to the same extent and in the same case as any *huissier*, *gardien* or *receveur de consignations* would have been liable under the laws of Canada previous to the year of our Lord 1759. Provided always that where any defendant or defendants shall offer a good and sufficient guardian or guardians to the Sheriff or Coroner seizing the goods and chattels of such defendant or defendants under any writ of *Fieri Facias*, *arrêt simple* or *revendication*, such Sheriff or Coroner shall be bound to accept of such guardian or guardians, and shall not be deemed answerable for the acts of such guardian or guardians, provided he can establish that such guardian or guardians when accepted of by him were solvent, or reputed so to be, to the amount of the value of the articles over which he or they were appointed guardian or guardians as aforesaid."

By the 23rd section it is enacted, "That whereas the seizure and custody of rafts and timber, more particularly when afloat, is attended with considerable risk and expense, inasmuch as a number of guardians are requisite to ensure the safe keeping of such rafts and timber, it shall and may be lawful for the Sheriff before executing such seizure, under any process to him directed, to demand and receive in advance from the plaintiff or plaintiffs, his or their attorney or attorneys *ad litem*, such sum as shall by any one of the Justices of His Majesty's Court of King's Bench for the District, or Provincial Judge of the Inferior District where such process shall issue, be deemed sufficient for the safe keeping of such raft or timber."

## COURT OF VICE ADMIRALTY.

MICHAEL HENRY PERCEVAL and ANOTHER, *qui tam*.  
v.

THE SLOOP HARROWER, *Joseph Gignac*, Master.

2nd August,  
1816.

Change of  
master not  
endorsed on  
register, and  
no bond given  
by new master  
according to  
the 26th Geo.  
III. c. 60. §  
18. and 27th  
Geo. III. c.  
19. § 7. ope-  
rates a forfei-  
ture. (a)

THIS vessel was seized at Montreal in this province, with her cargo, and claimed by the owner, at Quebec. On the part of the Officers of the Customs five breaches of the laws were alleged—

1st. Her departure from Quebec for Montreal, without a certificate of registry according to the form of the 26th, Geo. III. c. 60. § 18.

2nd. That the said sloop, which by the acts 26th and 27th, Geo. III. should have been registered, departed with her cargo from Quebec not being so registered, and not being entitled to any of the privileges of a British built ship, or of a ship owned by British subjects, but to all intents an alien ship.

3rd. The departure as aforesaid, the master having succeeded to James Armstrong, without the owner or master having delivered to the persons authorized to make registry and grant certificates at Quebec, being the port at which such change took place, any certificate of registry that a memorandum thereof might be subscribed thereon, &c.

(a) The provisions contained in the statutes under which this forfeiture was declared, form part of the present Registry Act 3rd and 4th, Will. IV. 55. § 21.

4th. The master not having given security by bond under the penalties prescribed by the said acts.

5th. Her departure as aforesaid and not being a ship or bottom of the built of England &c., but at the time of seizure being an alien ship, &c.

JUDGE KERR.

This case submits an important question to the consideration and decision of the court, and though I regret that proposing to embark for England in the course of a few days, I have not been able to give it all the attention it merits, yet my judgment has been greatly assisted by the very able arguments of the counsel on both sides.

The question in the pleadings and evidence is whether the Sloop Harrower of this port, having a fixed deck, and having performed a voyage to Halifax, is or is not within the provisions of the Registry acts.

The great objects which the wisdom of our ancestors intended to advance, were the building of ships throughout His Majesty's dominions, and the employment of British seamen in the navigation of them ;—and its policy was to act adversely to the endeavours of foreign nations to obtain a participation in the trade of Great Britain and her colonies. Considering these views, as the leading stars to guide our progress, we shall find less difficulty in coming to a right conclusion on the question proposed. The Legislature after passing the 12th, Chas. 2. c. 18. to exclude all but English ships and vessels, whereof the master and three fourths of the seamen must be English, from the colonial trade, found it necessary in order to enforce the policy of the act to establish a criterion by which English ships should be distinguished from foreigners :

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This gave rise to the provisions in that act and more particularly to the 17th clause of the 7th and 8th of William III. c. 22. by which it is declared that all ships after proof made in the manner therein prescribed, of their being of the built of England, Ireland, Wales, Berwick, Guernsey, Jersey, or any of his Majesty's Plantations in America, shall be registered, excepting "fisher-boats, hoys, lighters, barges, or any other vessels, though of English or Plantation built, whose navigation is confined to the rivers or coasts of the same Plantation or place where they trade respectively, but only of such of them as cross the seas to or from any of the lands, islands, places or territories, in this act before recited, or from one Plantation to another." (a) If this exception to the general regulation be not enlarged by some subsequent act of Parliament, this sloop, being neither a fishing boat, a hoy, a lighter, a barge, or open boat, and having traded to Halifax, is not within the exception, and of course is subject to the penalty of forfeiture inflicted by the 18th section of the act. As the trade of the nation increased it was thought necessary to confine the advantages of British trade to ships wholly built and fitted out in His Majesty's dominions, and this policy is manifested both in the preamble and enacting clauses of the 26th, Geo. III. c. 60. In pursuance of this policy that statute in the 3rd section declares "That all and every ship or vessel, having a deck, or being of the burthen of 15 tons, or upwards, belonging to any of His Majesty's subjects in Great Britain, or Guernsey, Jersey, and the Isle of Man,

“ or any of the aforesaid colonies, plantations, islands, “ or territories, shall, from and after the respective “ times hereinafter expressed, be registered.” From which provision are excepted in the 6th section, “ vessels belonging to the Royal family, or any lighters, “ barges, boats, or vessels of any built or description “ whatever, used solely in rivers and inland navigation.” It is not pretended that the Sloop Harrower belongs to the Royal family, that she is a lighter, a barge, a boat, nor—having performed a voyage to Halifax—can she be said to have been solely used in rivers or inland navigation, admitting these words to apply to the navigation of the vast extent of water which composes the Gulf and River St. Lawrence. And though, for the reasons therein assigned, this exception was extended by the 27th, of His Majesty, c. 19. to vessels of 30 tons “ not having a whole or fixed deck, “ and being employed solely in the fishery on the banks “ or shores of Newfoundland, and of the parts adjacent, “ or on the banks or shores of the Provinces of Quebec, Nova Scotia, New Brunswick, adjacent to the “ Gulf of St. Lawrence, and to the North of Cape Canso, or of the islands within the same, or in trading “ coastwise within the same limits, shall be subject “ or liable to be registered,” yet still this sloop is as far as ever from coming within the enlarged exception contained in this act; for she has a whole or fixed deck, and she is not employed in the fisheries, nor does she trade coastwise within the limits described in the statute. She is not comprehended within any of the negative propositions in the exception, so that she is clearly subject to the operation of the general rule.

But it is said this sloop has a certificate of registry,

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and has conformed to the provisions of the registry acts, and how far this is the case is disclosed in the evidence. It appears that the Harrower was built at Beauport, near Quebec, in the year 1795, on account of John Young & Company, that she soon after, whilst the property of these owners, made a voyage to Halifax, in Nova Scotia, that she afterwards proceeded on another voyage to Halifax, with her cargo, and went on shore below Quebec; but Mr. Stewart (a) adds, he can not say whether she performed this second voyage or not. It is distinctly proved that she was not registered before the year 1814, that is to say, 19 years after she was built, and after the present claimant had become owner, but having thus complied with the provisions of the act in this respect, the first and second allegations of this libel are not maintainable.


However there is one omission in the sequel of this transaction, which forms a constituent head of allegation in this libel, on which the respondent is less fortunate in convincing me that he is not within the scope of the penalties inflicted in these acts, and that is, that on the change of master, there was no indorsement on the certificate, and no bond given by the new master in conformity to the 18th clause of the 26 Geo. III. c. 60. and 27. Geo. III. c. 19, § 7. It is in vain the claimant urges a part fulfilment of the requirements of these acts, to exempt him from their penalties. He must strictly conform to the directions of these Statutes, otherwise he subjects his ship to be considered in law, as an alien ship, under the plain sense and meaning of the 13th section of the 27th of the King, c. 19. The Counsel for the

(a) An officer of the Customs examined as a witness on the part of the prosecutors.

respondent has attempted to shew that Gignac was not the master; that he was only put in by Armstrong, whose name appears in the certificate of registry, as master for a few months till the return of the claimant from England. But the words of the act, are, "That when and so often as the master, or other person, having the charge or command of any ship or vessel, registered in manner herein before directed, shall be changed." By whatever name Gignac might have been called, he had clearly the charge of this sloop for several voyages to Montreal, and therefore, came within the description contained in the 17th sec. of the act.

The more attention which is bestowed in the examination of these acts the more precise they appear in their language, and all their provisions unite in promoting the great object of their policy, namely the advancement of the building of British ships, and the employment of British seamen in the navigation of them; and at the same time to exclude foreign ships, excepting under special circumstances, from all the advantages of British trade. These objects could not be attained unless this sloop were held to be within the description of vessels subject to the registry acts.

It is greatly to be lamented that so many great irregularities have been committed by the owner of this sloop. I am induced to think that he has erred entirely through an ignorance of law, and perhaps from the absence of the claimant from the Province. But ignorance of law is in no case admitted as an excuse for breach of the law, and the claimant must incur the responsibility for the errors and omissions of those in whom he has reposed a misplaced confidence. If I had any equitable discretion in the administration of

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these laws, I should have no difficulty in releasing this ship and cargo, but being tied and bound by the fetters which are imposed by these Acts, I am obliged to say that the 3rd, 4th and 5th allegations in the libel, are proved, and I condemn this sloop, the same being at the time of seizure an alien ship. And I further decree that the claim be dismissed, and further order that the appraised value of the said sloop be forthwith paid into the registry of this court, to be divided after the payment of expenses. Bills of which are hereby ordered to be corrected as the law directs.

The Reporter has been favored with the following case transmitted to England, to be laid before the Commissioners of His Majesty's Customs, who subsequently ordered restitution of the sloop and cargo, under the powers wherewith they are invested in that behalf.

The grounds upon which the sloop Harrower was stated to be liable to condemnation, are: 1. That she had sailed without a clearance, and was therefore liable to be taken and considered as a foreign vessel. 2. That the master had been changed, and no endorsement of such change made upon the Certificate of Registry.

The ground of her being an unregistered ship, as stated in the libel, was of course abandoned, it appearing that she had been, in fact, registered long before the period of the alleged offence.

It appears that the custom house here, was under an impression, derived from certain instructions and opinions (as understood,) from home, that vessels, solely employed in the inland navigation of the river St. Lawrence, were liable to the penalties imposed by the British Registry acts, and the true cause of the seizure of this sloop was a supposed liability to forfeiture from her having sailed without a register, and without a clearance. The ground upon which the sloop was ultimately condemned, was one furnished to the officers of the customs, by the ingenuity of their Counsel, viz: no endorsement being made upon the certificate of registry after a change of master.

Upon the second point, it was contended on behalf of the claimant of the ship, 1. That the vessel being solely employed in the inland navigation of the river St. Lawrence, was not liable to any of the penalties of the Registry acts. 2. That no penalty was imposed by those acts for the omission to make the endorsement in question; that the act was merely directory, and a forfeiture could not be created but by express words. 3. That conceding these two points to the libellants, no change of master had been proved. 4. That, if a change of master were proved, the penalty could only attach when the vessel should commence a voyage to sea, or to another British Plantation.

The leading objects of the policy of the laws of shipping and navigation are so nearly identical with those of trade, that the considerations applicable to the one point, made by the libellants, will go a long way towards determining the weight due to the other.

The laws of trade, so far as they bear upon the colonies, may be distributed under four heads.

1. Laws regulating the trade between the mother country and the colonies.
2. Laws regulating the trade between the colonies and countries not subject to the Crown of Great Britain.
3. Laws regulating the intercolonial trade.
4. Laws regulating the internal trade of the colonies.

The mother country reserves to herself the exclusive trade of the colonies, in British or Plantation built shipping. This right, must of necessity, be enforced by penalties and other legislative provisions to prevent frauds. We accordingly find

1. That the master of every ship setting sail for the colonies, is obliged to enter into a bond, that the commodities laden by him in the colonies, shall be brought to some port of England, Ireland, Wales, or Berwick upon Tweed, 12. Car. 2. c. 18. § 19.
2. That no commodity of the produce or manufacture of Europe can be imported in a British Colony, but what shall be laden in England, &c. in British shipping, &c. and the penalty of forfeiture of ships and goods is imposed for breach thereof, 15. Car. II. c. 7. § 6. (The words of the 4th Geo. III. c. 15. § 30. are more general, requiring that the whole and entire cargo of the ship be laden in Great Britain, &c.)
3. That all ships coming into or going out of colonies, and lading or unlading goods or commodities, shall be liable to the same rules, visitations, searches, penalties and forfeitures as in Great Britain, &c. 7 & 8. W. 3. c. 22. sec. 6.
4. That bond and security be given before lading any iron or lumber in the British Plantations, that the same will be landed in England, &c. 4. Geo. III. c. 15. § 28.
5. That a ship arriving from Europe, discovered within two leagues of shore, and having on board goods for which a cockpit or clearance is not produced, shall be liable to seizure, &c. 4. Geo. III. c. 15. § 30.
6. That foreign vessels at anchor, or hovering on the coasts of plantations, and not departing, unless distressed, within 48 hours, shall be liable to seizure and forfeiture, with cargoes, 4. Geo. III. c. 15. § 33.
7. That goods found concealed after report, shall be liable to seizure and forfeiture, and master to forfeit treble value. § 36.
8. That goods landed in absence of custom house officer, or without warrant to land, or without payment of duties, shall be liable to forfeiture.

These different enactments, made from time to time, as necessity called for them, (see Chalmers' Political Annals,) have been found amply sufficient to secure to the mother country the exclusive trade of her colonies. Not one of these acts relates either to the internal trade of the colonies, nor to the intercolonial trade. As to the internal trade of the colonies, provisions of this nature could only serve to trammel it without necessity or benefit. And for the intercolonial trade, other provisions were made, calculated to meet the particular exigencies of that trade. Of statutes relating to the trade of the colonies with other countries than the mother country, or her colonies, nothing need here be said. They are relaxations of the general rule, and admitted for purposes connected with the immediate interests of the mother country, such as the encouragement of the fisheries, &c.

The only British Statute relating to the internal trade of the colonies, with which I am acquainted, is the 12. Car. II. c. 18. § 2. prohibiting alien merchants from trading in the colonies, and subjecting them to the penalty of forfeiture of all their goods and chattels, if they do carry on trade in the colonies. There is no British or Provincial Statute which

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imposes upon the merchant trading in the colonies, the obligation of taking out a clearance to authorize him to remove his goods, from one part of the colony, to another part of the same colony. Indeed, what is a clearance? It would seem that a clearance is not any single document, but the collection of all those papers which are necessary to enable the ship to sail, (3. Taunton, 554.) But none of the Statutes require, in the internal trade of the colonies, any bond, or manifest, or cocket, or any other paper or document, to enable the ship legally to sail.

Next, as to the liability of the vessel to forfeiture and condemnation under the registry acts.

1. The vessel being solely employed in the inland navigation of this colony, was not liable to any of the penalties of the registry acts.

The 7. and 8. W. III. c. 22. require British and Plantation built ships to be registered, with the exception, however, of "fisher boats, hoys, lighters, barges, or any open boats, or other vessels, (though of English or Plantation built,) whose navigation is confined to the rivers or coasts of the same plantation, or place wherever they trade, respectively," § 20. but the same statute excluded foreign built ships from the inland navigation, § 2.

The 26. Geo. III. c. 60. also requires the registry of ships, but excepts "ships or vessels of war, or any other vessels of whatever built the same be, or under whatever description the same may fall, being the property of His Majesty, or the Royal family, or any of them, or any lighters, barges, boats or vessels of any built or description whatever, used solely in rivers, or inland navigation.

That the navigation of the river St. Lawrence between Quebec and Montreal, is an inland navigation, no one who casts his eye upon the map of the country can doubt; that the Harrower was solely used in the navigation of the river St. Lawrence, will be found, on reference to the evidence in the cause, equally certain. It cannot be concluded that because the legislature used the words "all and every ship," in the 3rd section, it meant therefore, to require even those ships to be registered, which as appears from other parts of the act, were intended to be prevented from being registered, (Long v. Duff, 2. B. & P. 215.)

But it is said that the vessel was liable to condemnation, because she had once been employed in a foreign voyage, several years before the seizure. The words of the act are "solely used in rivers or inland navigation." To what time do these words relate? clearly to the time when the forfeiture is supposed to have been incurred. Again—this vessel having been built upon, and altered subsequent to her foreign voyage, was to be, to all the intents and purposes of the registry acts, a new ship: and accordingly, the owners could not have sent her to sea, after such alteration, before first obtaining a new certificate of registry, 26. Geo III. c. 60. § 24. But can it be pretended that the same rule applied to her being sent to Montreal, or any other port on the river St. Lawrence? Did she not clearly fall within the exception of the sixth section of that statute?

2. No penalty is imposed by the registry acts, for omission to make the endorsement upon the change of master. No case has, I believe, occurred in England, of a forfeiture being declared by a court of law, to be incurred without express words in the statute, under which the forfeiture is prayed. To shew that forfeitures cannot be raised by implication, innumerable authorities might be cited, but I choose rather to refer to the case of Long v. Duff, above cited, as that was a case upon the interpretation of a clause in this very statute.

The case of the schooner *Friends Adventure*, Daniel Curry, master, reported in *Stewart's* reports of cases argued and determined in the court

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of vice admiralty, at Halifax, was cited on the other side. This was a case of a vessel sailing from one colony to another colony, and a change of master, without the required endorsement. With the difference that the sailing of the Harrower was inland, the two cases may be considered as similar. Dr. Croke condemned the schooner *Friends Adventure* for this omission, and assigned as a reason, that "as no special penalty is inflicted, upon the neglect of the direction, upon a change of master, this part of the act would be neglected unless it were in the power of the court to inflict some penalty." With all due respect for the talents and learning of that Judge, he might well be challenged to produce a case wherein an English court of justice, since the abolition of the court of the Star Chamber, did for the purpose of preventing a part of an act of Parliament from being neglected, inflict the high penalty of forfeiture where confessedly, no special penalty was inflicted by the act itself. The enactment in the 27. Geo. III. c. 19. § 13. cited by Dr. Croke, that all vessels not registered according to the directions and regulations of the 26. Geo. III. although owned by British subjects, shall be held and deemed, to all intents and purposes, as alien ships, and shall in all cases be liable to such penalties and forfeitures as alien ships does not, as it seems to me, embrace this case. The endorsement upon a certificate of registry *ex vi termini* implies that the ship has been previously registered. Again, the legislature's not imposing any penalty upon the omission to make the endorsement directed by the act 26. Geo. III. did not proceed, as it seems to me, from want of foresight in the framer of that statute, for "that statute was framed by an able statesman, (a) who is peculiarly conversant in the commercial interest of England;" (3. T. R. 412.) but from such penalties being quite unnecessary. How is a ship to obtain the proper papers from the custom house, to enable the master legally to proceed in the voyage, but by the agency of the master? What other master can the custom house recognize than the master named in or upon the register? It would have been worse than useless for the legislature to impose a penalty, and the high penalty of forfeiture, upon a vessel sailing to foreign parts under the charge of a master other than that named in the register, since she could not so sail, unless the officers of the customs neglected their duty. And was this to be presumed in an act of Parliament? and if it were presumed, was the innocent merchant, or ship owner to be punished for the neglect of the custom house officer?

3. No change of master has been proved. It is in evidence that in the spring of the year 1815, James Armstrong was master of the Sloop Harrower. He having purchased a vessel which he purposed to navigate on his own account, employed Gignac, as his servant, to navigate the Harrower. His contract with the claimant was not determined. In truth, the claimant was in Europe, and a contract entered into by their mutual consent could only be dissolved in the same way. Gignac was appointed, not by the claimant of the Harrower, but by the master of that vessel.—Armstrong had no authority from the claimant of the vessel to substitute another master in his place, and shall the owner of the vessel be held answerable for the acts of the master out of the scope of the authority of the master appointed by him?

4. The penalty could only attach when the vessel commenced a voyage to sea or to another British Plantation. The laws of shipping, navigation and trade, generally speaking, apply only to the shipping, navigation and trade from and to the colonies. They do not touch the internal trade of the colonies further than to enjoin that the trade of the colonies shall be carried

(a) Lord Hawkesbury.

EXPARTE THE REVEREND GEORGE SPRATT.

October 6th,
1816.

A dissenting minister of a protestant congregation, not being a public officer, nor a person in public holy orders recognized to be such by law, is not entitled to, and cannot keep a parish register for baptisms, burials and marriages.

GEORGE SPRATT had presented a petition praying that in obedience to the Provincial Statute 35, Geo. III. c. 4. the court would order and direct, two registers for the entry of marriages, baptisms, and sepultures, to be *paraphed* and delivered to him as a dissenting minister from the Church of England, of the sect called Congregationalists, doing the clerical duty of a congregation of the same sect at Quebec. In support of this petition sundry papers and affidavits were fyled, in which it was stated,—1. That the petitioner had at Gosport, in England, by divers lay characters, been ordained “to the office of a christian minister,” in the form, used by the Congregationalists, for the ordination of their ministers.—2. That, as a minister, so ordained, he was now performing the clerical duty of a congregation of the before mentioned

on in British or Plantation built ships, by British subjects. The sailing of a ship from one port in a British Colony to another port in the same Colony does not subject the parties to any penalty. Where is the line to be drawn? for it must be drawn somewhere—not at the period of the actual change of master, otherwise every merchant vessel in England might be seized and confiscated for one minute after the change of masters; it would be true to say, that a change had taken place, without any endorsement upon the certificate of registry, and the absence of fraud in the parties would not protect them, not at the period of the vessel's proceeding from one part to another part of the same province, otherwise any change of place would give occasion to forfeiture. The only period that can be fixed is the vessel's proceeding upon a foreign voyage,—foreign *quoad* the colony. Now, no such voyage was commenced by the Harrower, or contemplated by her owners.

dissenters at Quebec. For the petitioner it was contended, that the petition could not fail for want of proof of the facts on which it was founded, that it was the proper weight of those facts, and that only, which was in question. The Act of the 35th, Geo. III. admits of no dispute as to dissenters, which does not involve the establishment of the Church of England itself. When it was passed there were no parishes, no churches, no ministers of the Church of England, established in the country. The whole of the protestant population of the province were but, in fact, so many congregations of persons, who assembled wherever they could, for public worship : every construction of the act therefore, which excludes other congregations of protestants, must exclude the congregation of the Church of England, for such they were and no more. Even the statute, in the tenth section, enacts a course for making valid the register of the protestant congregation of Christ Church, Montreal, which is, unquestionably a church of the established religion of England. The act (a) clearly meant to include all congregations of protestants, from its general tenor, by the disjunctive “or.” A priest is throughout distinguished from a minister of lay ordination,—a “priest or minister,” “church or congregation,” are throughout the expressions of the act ; and this shews that it was intended to include protestants of all sects and

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(a) The act 35th, Geo. III. c. 4. requires that after the 1st day of January, 1776, in each of the protestant churches or congregations within this province, there shall be kept by the rector, curate, vicar, or other priest or minister, doing the parochial or clerical duty thereof, two registers of the same tenor, each of which shall be reputed authentic, and shall be equally considered as legal evidence in all courts of justice, &c. in each of which, &c.

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denominations, priests "in holy orders" and ministers in "pretended holy orders." That the case should be considered equitably, and then the state of the District of Gaspé and of the Eastern Townships would weigh in the scale: there, few of the inhabitants are members of the churches of England and Scotland, all or nearly all are dissenters. A construction of the statute which does not extend its benefits to dissenters, will deprive a vast majority of the protestant subjects of His Majesty, settled in this province, of all the advantages to be derived from parish registers. That the Attorney General might make such use as he saw fit of the case of *Clarke Ben-ton*, which was heard in this court in the year 1804, but that it was by no means applicable to this case.

The Attorney General, in resisting the application, stated that to enable the petitioner to obtain a register, the place of meeting selected by his congregation should have been certified to the Bishop of the diocese and registered as the act 1st. W. c. 18. directs. A certificate of his having qualified himself should also be produced under the hand of the Clerk of the Peace of the county, in England, where he was qualified, and he should make it appear further that he has taken the oaths prescribed by the statutes 1st, W. c. 18. 19. and 19th, Geo. III. c. 44. That he could not stand here, in a better condition than he would in England, where he would not be allowed to take the title, even of a dissenting minister, before all the requisites of the statutes which have been cited, had been strictly complied with.

In reply, it was said that the colonies were not mentioned in the statutes cited by the Attorney Ge-

neral, and that therefore the petitioner could not be bound by them.

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The petitioner, George Spratt, alleges himself to be a *protestant dissenting minister*, from the Church of England, doing the clerical duty of a congregation of dissenters, who are called "Congregationalists," in Quebec; and upon these grounds he avers, that he is legally entitled to have and keep a register of baptisms, marriages and burials under the Provincial Statute 35th, Geo. III. c. 4. The prayer of his petition accordingly requires us to paraphe, that is, to certify and countersign, a register for him and for the congregation which he serves, as the act directs. The predecessor of this petitioner, *Clarke Benton*, in the very station which the former now fills, viz.; "Minister to the Congregationalists of Quebec," advanced in this court, in the year 1804, his claim to have and keep a similar register, and after a lengthy discussion of his pretensions, he received a solemn judgment against his claim. In the case to which I refer, *Benton* pleaded to an information fyled by the then Attorney General to this effect, "That in January, 1801, by a congregation of dissenters from the mode of worship used by the established Church of England, assembling for the worship of God in the parish of Notre Dame, commonly called the parish of Quebec, in the province of Lower Canada, he had been regularly and unanimously chosen and appointed their pastor, to minister unto them in all holy things; and that he had been, and still continued to be, the appointed, accepted, and acknowledged pastor of the said congregation, and there-

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“ fore, had legal title to keep a register.” To this plea the Attorney General demurred, and issue having been joined, and the case fully argued, judgment was entered up and stands recorded in the following words :—“ That the plea of the said Clarke Benton, “ by him pleaded, is not sufficient in law, and it is “ thereupon adjudged, that the said Clarke Benton “ do not, in any manner, intermeddle with, or concern himself, in the office of a priest or minister, “ doing the clerical duty of a protestant church or “ congregation within this province, or the rights, “ liberties, privileges and franchises to the said office “ belonging and appertaining, nor any of them ; but “ that he be from henceforth wholly prejudged from “ exercising and using the same, and every of them, “ and that the said *Clarke Benton* be taken to satisfy “ the King for the usurpation aforesaid.”

This case is strictly in point, upon the present occasion, and the judgment upon it is a solemn decision upon the prayer of this petition. We concur in this decision, and shall now state the reasons which induce us to do so.

It must be remembered that the Provincial Statute 35th, Geo. III. c. 4. is nothing more than a regulation *as to evidence* in the courts of law in this province respecting births, marriages, and sepultures ; the effects of which are purely temporal, and do not affect the spiritual concerns or the toleration of any sect or denomination of christians whatever. If the character, and office, of the petitioner, are within the letter and intention of this statute, he has a right to a register, if they are not, he has no such right. The British statute 14th, Geo. III. c. 83. commonly called the Quebec

act, declared the law of Canada,—as it stood at the conquest,—to be the rule of decision in all matters of controversy and civil rights ; and hence, the law of evidence in this province is materially different from the law of evidence in England. With us, deeds of conveyance, mortgages, &c., are executed before a notary, who is a public officer, appointed for that purpose by the Crown, and with him the original deed remains, in each instance, deposited of record ; the parties have each a copy certified by him to be an exact transcript from the original, and these copies are evidence in all courts of justice, and prove themselves, unless they are formally impeached as forgeries. This provision of the law of Canada is not, however, confined to notaries ; it extends to all public officers who are appointed by the Crown, and have the charge of records of a public nature, such as the prothonotaries of the Court of King's Bench, the Secretary of the Province, and others of a similar description. Any writings which thus prove themselves are denominated authentic (*actes authentiques*.) If we inquire into this sort of evidence as to "*actes authentiques*,"—and it is material that we should,—we shall find that it is founded on the principle, "That the " Crown, holding the right of nomination to office in " trust, will not appoint to public offices, any other " than persons of whose good character and integrity " it is assured ;" as will appear from the following authority :—" La confiance dans une acte authentique est fondée sur ce que le souverain, appréciateur du mérite et des talents de ses sujets, n'auroit point donné d'emploi dans l'ordre publique, à l'officier, s'il n'avoit eu un témoignage de ses mœurs et de sa capacité ;

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témoignage encore, qui se fortifie par l'enquête de *vie et de mœurs*, et par le serment qui précèdent sa réception." (a) Now from this principle it follows necessarily, that the power of passing an *acte authentique*, cannot be derived, as to the officer who passes it, from any other source than from the Crown; so that an *acte authentique* cannot emanate from any other than a public officer of the government. *Le Camus* in his late edition of *Denizart* defines an "*acte authentique*" in these words; "l'acte authentique est celui qui, étant consigné dans un registre publique, ou bien étant émané d'un officier public dans la fonction, pour laquelle la loi l'autorise, se trouve revêtu des solennités que la loi a prescrites." (b) The *Repertoire* expresses the same idea in these words; "Les actes authentiques sont ceux, qu'a reçus un officier public avec les solennités requises: les écritures privées sont les actes que font les particuliers sans le concours d'un officier public." (c) And the language of the *Avocat Général Gilbert*, in the conclusions which he took in the celebrated case of *Bellicant* against the *Marquis de Hautefort*, is to the same effect; whoever passes an "*acte authentique*," says he, "*est le ministre public, de la loi, et du gouvernement temporel, à qui seul il appartient de conférer le pouvoir d'imprimer aux actes l'authenticité.*" (d) From these general authorities it is evident, that the right of keeping a register of baptisms, marriages and sepultures, with the power of rendering the entries therein made, *actes authentiques*, or records which, by the 20th title of the edict of 1667, was, at the con-

(a) 1. Rep. de Jur. 809.

(b) 1. L. C. Den. 159.

(c) 12. Rep. de Jur. 280.

(d) 1. L. C. Den. p. 165.

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quest, vested in the then parish priests of Canada, was by law considered to be so vested in them, not by reason of their spiritual or ecclesiastical character, but because they were, by law, the acknowledged public officers of the temporal government; a few extracts will confirm this inference,—“ La loi veut que les actes de celebration de mariage soient écrits et signés, dans des monumens publiques qui servent de minute.”—“ Le ministre de l’église est *comme officier publique* en cette partie, et son acte a autant d’autorité en justice, que la sentence rendue par un Juge, ou un contrat passé devant un notaire.” (a) Il,—le registre,—doit être seulement signé par le curé qui a donné la forme à la minute, et qui, *en cette matière, est le ministre publique*, nous ne dirons pas de l’église, car à cet égard sa fonction ne seroit que spirituelle, mais de la loi et *du gouvernement temporel*. (b) “ Ces registres doivent être écrits de la propre main du curé, lequel n’a pas besoin d’affirmer, que ce registre est véritable, *est enim persona publica et sacerdos*.” (c) Then, as a register of baptisms, burials and marriages, is a record of a public nature, and as all the entries therein made, are official declarations of facts, which by the express words of the statute 35th, Geo. III. c. 4. are declared to be “ *actes authentiques*,” (d) he that claims the right of keeping a register and to record baptisms, burials and marriages, contends, that his entry of such facts, is an “ *acte authentique*” and consequently, must shew that he is a public officer. It is not then sufficient for the petitioner to shew “ that

(a) 2. Cochin 565 and 3d. 780.

(b) 1. L. C. Den. 164. 165.

(c) Danty. 776

(d) See the preamble and sect. 1.

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“ he has been ordained a christian minister, in the
 “ form used by the dissenters from the Church of
 “ England called Congregationalists, and that he
 performs the clerical duty of a protestant congrega-
 tion of that *sect* of dissenters in Quebec, he must go
 further and shew, that a minister so ordained, is within
 the class and character of priests and ministers, con-
 templated by the statute,—that his ecclesiastical cha-
 racter, and present office, are sufficient to enable him
 in *law*, to render his entries in the register which he de-
 mands, authentic. And to this end he must shew that
 his ecclesiastical character, and present office, are both
 of public institution, and not of sectarian origin; that
 his authority in each, is derived from the public gene-
 ral government of the province, and not from a mere
 portion of its subjects; that he himself is a public, and
 not a private character; an officer, mediately, or im-
 mediately, of the King’s appointment; and not the
 servant of a self-created society of individuals, not esta-
 blished, but simply tolerated by law; who, if they be
 of ecclesiastical denomination, have no more right to
 appoint an officer, for the execution of an Act of Par-
 liament, than a lodge of freemasons, a friendly society,
 or any other voluntary association of a similar des-
 cription.

Under the Ordinance of the year 1667, which was
 the law antecedent to the Statute 35, Geo. III. c. 4.
 the keeping of registers was entrusted to the *curés* of
 the Roman Chatholic Church, and to their successors
 in office, and to such only; and the *curés* were vested
 with this authority as priests, in holy orders, recognized
 to be such by law, and as *public* officers in their respec-
 tive stations. The late Provincial Statute does not

change the character or qualifications of the persons to whom the keeping of registers is now to be entrusted: It extends the power of keeping registers to protestant ministers, but still requires that all persons keeping registers, whether catholics or protestants, should be priests in holy orders, recognized to be such by law, and public officers in their respective stations. The 15 section of the Statute accordingly enacts, "that so much of the 20th title of an Ordinance passed by His most Christian Majesty, in the month of April, in the year 1667, and of a Declaration of His most Christian Majesty, of the 9th April 1736, which relate to the form, and manner, in which the registers of baptisms, marriages, and burials, are to be numbered, authenticated or paraphé, kept and deposited, and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of the said Ordinance and Declaration, are thereby repealed, "so far as relates to the said registers only;" and consequently the Ordinance and declaration are not repealed with respect to the character and qualifications of the persons by whom they are to be kept, and by whom the entries of baptisms, marriages and sepultures, are to be made. In conformity to this general declaration, and to the Ordinance of 1667, the 4th section of the Statute also, especially enacts, "that every marriage shall be signed in both registers, by the person celebrating the marriage," who must necessarily be a priest in holy orders, recognized to be such by law. Since by the law of Canada, a marriage can only be celebrated by such a character. (a) And the 5th section enacts with equal

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(a) Ord. of 1539. And 2. De la Jannès, 2.

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precision, that entries of burials shall be signed by "the *clergyman*" who performs the burial service, which, again implies a clerk in holy orders, (a) recognized by law to be such, in contradistinction to pretended holy orders, and to persons pretending to holy orders, as they are termed in the ordination acts.

Upon these principles we cannot do otherwise than reject the prayer of this petition.

Judgment—that the petitioner take nothing by his petition. (b.)

(a) 4. Black. Com. 217.

(b) See the *Pandectes Françaises*, vol. 2. p. p. 244-245.

McDOUALL *against* FRASER.

19th October,
1816.

If property
after a sale
perfected, is
burnt by acci-
dent, before
delivery, the
loss falls on
the purchaser.

McDOUALL having a bill of exchange drawn on Fraser for £1000, agreed to accept in payment a quantity of gin and sugar lying in a warehouse belonging to Brehaut and hired by Fraser. The latter gave an order to Brehaut to deliver to McDouall the entire quantity of gin and sugar which McDouall had thus purchased ;—a bill of parcels was made out by Fraser, with a receipt for the amount, and McDouall gave up to him the bill of exchange. The sale was thus concluded on the 2nd of August, and on the 12th of September following McDouall took from Brehaut's warehouse, the whole of the gin, being 464 gallons and 4481 pounds, being part only, of the sugar of which the value was £791 14s. 5d. and left the remainder of his purchase (which consisted entirely of sugar) in the warehouse where it was consumed, accidentally, by fire, a few days afterwards : no cause was assigned for the delay which had taken place in removing the gin and sugar from Brehaut's warehouse, and it was in evidence, that Fraser in the month of August had summoned McDouall to remove them. This action was to recover the value of the sugar which had not been received by McDouall.

SEWELL, CH. J. As soon as a sale is perfected the thing sold is at the purchaser's risk, and if it perishes without any neglect on the part of the seller, the pur-

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chaser must bear the loss even in cases in which a delivery has not been made. (a) The sale, in this case, as to the sugar, was of a certain number of hogsheads lying in Brehaut's warehouse, and as it does not appear that any others belonging to Fraser were there it was a specific sale, and the above rule applies. It is, moreover, doubtful, whether a delivery of the whole was not made. But at all events it is in evidence that McDouall was summoned (under protest) by Fraser some days before the fire, to take away the remainder of his sugar, and was, therefore, *en demeure*, for he was bound (as it was not otherwise stipulated) to receive the things he had purchased at Brehaut's store, (b) and to remove them from thence in a reasonable time. (c) There is neglect, therefore, on the part of McDouall and none on the part of Fraser, and the loss being thus evidently a consequence of McDouall's default, because, if he had removed the sugar as he was bound to do, it would not have been burnt in Brehaut's warehouse, he must abide by the loss.

Action dismissed.

(a) 17. Rep. de Jur. 482. v. Vente, sec. 4. § 1.
 5. Ferr. Instit. 111.

Domat Contrat de Vente, Tit. 2. § 1. art. 2. and sec. 7. art. 2.
 Pothier. Vente. Nos. 56. 307.

(b) Poth. Vente, Nos. 52. 290. 291.

(c) 2. Comyns on Contrats 213, 17. Rep. de Jur. 482. v. Vente.

HANNA v. HANNA.

19th October,
1816.

GODFREY HANNA made his will, by which he distributed his property among his children. At the time the will was made his wife was not *enceinte*, but she became so afterwards, and after the death of Godfrey Hanna the child was born.

The birth of a posthumous child revokes the will of its father partially.

Per curiam. The birth of a posthumous child revokes the will of the father, especially in those cases in which, when the will was made, the testator had not reason to expect such an event; (a) but this revoca-

(a) 2. Cochin, 718. 1. Domat, 446. art. 15. 2. Fonblanque, 356.—2. Bourjon, 387. Sect. 3. art. 12. et seq.—La Combe v. Testament, sect. 5. Distinction 1. n. 25.—2 Ferr. Instit. de Just. 370. 371.

It is in the 14. Geo. III. c. 83. s. 10. enacted, "that it shall and may be lawful to and for every person that is owner of any lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods or credits, in his or her lifetime, by deed of sale, gift or otherwise, to devise or bequeath the same at his or her death, by his or her last will and testament; any law, usage or custom heretofore or now prevailing in the province, to the contrary hereof notwithstanding; such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England;" and in the Provincial Stat. 41, Geo. III. c. 4, to remove doubts and difficulties which had arisen in this province, touching the true intent and meaning of the first mentioned act, it is further enacted, "that it shall and may be lawful, for all and every person or persons, of sound intellect, and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the same be made by a husband or wife, in favor of each other, or in favor of one or more of their children, as they shall seem meet, or in favor of any other person or persons whatsoever, all and every his or her lands, goods or credits, whatever be the tenure of such lands, and whether they be *pro-pria*, *acquets* or *conquets*, without reserve, restriction or limitation whatever, any law, usage or custom to the contrary hereof in anywise notwithstanding."

The civil law considered the rights of sons in the power of the father at the time of his decease,—in the estate left by him,—as a continuation of a dormant right of property, existing in them in his lifetime, rendered free by his decease; and not as of entirely new acquisition, Dig. 28. 2. 11. Hence they were not said to acquire such an inheritance, but to retain it and im-

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tion,—speaking generally,—is not a total but a partial revocation, and can only extend so as to give to the

misce therein. They were not said to steal or rob effects belonging to the succession, but to amove them. They were not said to become heirs of the deceased, but to be his heirs. They were not said to repudiate the inheritance, but to abstain therefrom by the permission of the Prætor. In fine, no *aditio* or acceptance of the inheritance on their part was necessary.

The law of the twelve tables had bestowed upon the fathers of families an unlimited power of disposing of their property by will; and indeed of regulating other matters concerning the interests of their children. *PATER-FAMILIAS UTI LEGASIT, SUPER PECUNIE TUTELEVE SUE REI, ITA JUS ESTO*. But when the father of a family bestowed his property on a stranger, he was bound to disinherit his son or sons by name. General words of disinheritance were not sufficient. Dig. 28. 2. 1. *ibid.* ll. 2 & 3. If the son was not disinherited by name, the will was merely void, and even though the son died before his father the will was not rendered valid. § 1. *Inst. de exheredatione liberorum*. The power of disinheriting the son carries with it an apparent contradiction to the principle above stated of the son's dormant right of property during his father's lifetime, an apparent contradiction which is noticed by PAUL, and thus emphatically answered, *nec obstat, quod licet eos exheredare, quod et occidere licebat*. Dig. 28. 2. 11. In truth, the institution of a stranger as heir seems to have been considered as a transfer of the son's right to such stranger,—a transfer which the father in virtue of the *patria potestas* had unquestionably a right to make. This idea receives some support from the form of a will in the *comitia calata* given to us by Heineccius. *VELITIS JUBEATIS, QUIRITES, UTI L. TITIVS L. VALERIO TAM JURE LEGEQVE HERES SIBI SIT, QUAM SI EJUS FILIVS FAMILIAS, PROXIMVQUE ADGNATVS ESSET. HEC ITA UT DIXI, ITA VOS QUIRITES ROGO*. Heinecc. Antiquit. Rom. *ad Instit.* lib. II. tit. x. § 2.

Then as to posthumous sons, the well known principle of the Roman law was, *posthumus pro jam nato accipitur quoties de ejus commodo agitur*: and of necessary consequence the birth of a posthumous son who had not been by his father's will disinherited invalidated the will. *Posthumi per verilem sexum descendentes, ad similitudinem filiorum nominatim exheredandi sunt, ne testamentum adgnascendo rumpant*. Dig. 28. 3. 3. *Cum agnatione posthumi, vel posthumæ, cujus non meminit, testamentum ruptum sit: ex rupto autem testamento nihil deberi, neque pecti posse explorati juris est*. Cod. 6. 29. 1. The birth of a child after the making of the will, although he died before the testator, in strictness invalidated the will, Dig. 28. 3. 12. These rules were not founded upon any peculiar edicts or constitutions of the Emperors, but were a part of the common law of Rome, Valerius Maximus, lib. 7. c. 7. *de testamentis recissis*.

Without minutely entering into the history of the changes which took place, from time to time, in the civil law upon this subject,—principally by the interposition of the equitable powers of the prætor,—it will be sufficient to observe that, by a constitution of Justinian, the power of disinheriting was greatly limited. This constitution and these laws form the basis of the French jurisprudence.

The difficulty in the above case was, whether by the civil and French law, the destruction of the will by the birth of a posthumous child proceeded from any legal restriction of the powers of the testator, or from any implied change of intention or revocation by the testator.

The English law considers marriage, and the birth of a posthumous child

posthumous child a share *ab intestat* in the succession and inheritance of his father, that is to say, all which the law would have given to such posthumous child, if it had been born before the death of the testator, and the testator had died without disposing of his property by will.

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ALLEN *against* SCAIFE AND OTHERS.

19th October,
1816.

A QUANTITY of timber was shipped in Canada for Liverpool, at forty shillings per load, the contract being entered into and concluded at Quebec, and the freight payable in Liverpool. The merchant at Liverpool, on the arrival of the timber, pays freight at the rate of forty shillings for forty square feet, that quantity being a load at Liverpool; but finding afterwards, that a load at Quebec was fifty square feet, brought this action to recover back the difference.

The law of the country, in which a contract is made, and its usages, must govern in mercantile cases.

Per Curiam. The general principle, *locus regit actum*, must govern this case. As to the estimation of a

as amounting to an implied revocation of a will of lands made before marriage. But the naked fact of the birth of a posthumous child unprovided for, is not sufficient to set aside a will. *Doe on the demise, &c. v. Lancashire*, 5. Term Rep. 49.

The 14. Geo. III. c. 83, and our own Provincial Stat. 41. Geo. III. c. 4. having removed the restrictions upon the power of bequeathing, imposed by the civil and French laws, the principle adopted by the court, from the last mentioned system, was that of an implied partial revocation of the will.

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load, there is, it seems, one quantity in a Quebec load, and a smaller quantity in a Liverpool load; but as the contract was commenced and finished at Quebec, if the parties meant the latter, they ought to have expressed their intention, for otherwise, the law refers the parties to the former. The plaintiffs have overpaid the defendants erroneously, having no knowledge of the quantity contained in a Quebec load of timber, and the defendants must therefore refund. (a)

PACQUET v. GASPARD.

20th Feby.
1817.

An exception to matter pleaded by exception may be filed even under the Ordinance 25. Geo. III. c. 2. § 13.—*

THIS was an action "*Petitio Hereditatis*," brought by the plaintiff, as heir at law to Françoise Pacquet, to recover from the defendant a piece of land and dwelling house situate in the city of Quebec, of which the said Françoise Pacquet died seized and possessed.

* The following case of *Forbes v. Atkinson* and another, upon the forms of pleadings decided in this Court on the 17th day of February, 1810, is here inserted as having a material connection with the above decision:—

The declaration in this cause set forth, "That by a written agreement made and entered into between the parties on the 30th of June, 1789, the plaintiffs did sell to the defendant, and the defendant did purchase of the plaintiffs 20,000 feet, *more or less*, of white pine timber, and 10,000 pipe staves, *more or less*, &c." That the plaintiffs had performed their agreement and had in fact delivered 54,904 feet of pine and 6,700 staves, &c., but that the defendant had not paid, wherefore they prayed judgment for £3027, with interests and costs.

(a) 2. Comyn on Contracts. 24.
2 Burr. 1077. *Robinson v Bland*.
2. De la Jannès 324. p. 588.

To the plaintiff's demand the defendant pleaded by perpetual exception, the last will and testament of Françoise Pacquet, by which she devised to him (the defendant,) the piece of land and dwelling house in question.

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To this declaration the defendant filed a plea, intituled, a *défense au fonds en fait*, in which he pleaded—1. That he was not indebted; that he did not owe, and that he did not undertake as in the declaration set forth.—2. That he had not failed or made default in the performance of the agreement stated in the declaration.—3. That no greater quantity of pine timber than the quantity expressed in the agreement had been delivered to him, or received by him.—4. That for the quantity of timber delivered, viz., 20,000 feet of pine timber and 6,700 staves, he had paid in part; and—5. That he had made a tender and *offre réelle*, of the balance, which the plaintiffs had refused, before the institution of the action. The caption and conclusion of this plea were in the form prescribed for the *Défense au fonds en fait* by the rules of practice, and no part of it was in the form prescribed for the *Exception péremptoire en droit*. The parties being at issue, an application was made by the plaintiffs for a commission to examine certain witnesses in Upper Canada, when the Court suspended its order thereon and directed that the cause should be inscribed upon the *Rolle de droit*, for a preliminary hearing *en droit* upon the pleadings, and

Ross, for the plaintiffs, and Bowen, for the defendant, having been heard, the judgment of the Court was delivered by

SEWELL, CH. J. The case before us is the first, in which a question upon pleading has occurred, since the establishment of our present rules and orders of practice; and this will lead to a more extended consideration of the subject of *pleading* in general, than the case, under other circumstances, would call for.

LOGICAL, DISTINCT and CONSISTENT PLEADING is essential to the right administration of justice, and to facilitate the attainment of this important object the several forms of pleadings, contained in the appendix to the rules and orders, have been prescribed. The principle, upon which these forms are founded, should be thoroughly understood, and I shall avail myself of the opportunity now offered, to explain them generally, before I deliver the opinion of the court with respect to the particular points upon which we are to decide.

Every contested suit at law consists of the *demande* on one side, and the *defense* upon the other. Vide the words "*Intendits*" et "*articulation des faits*" in the *Repertoire*. The term *demande* implies the representation, and the claim of redress, which the plaintiff, in any instance, or suit at law, makes against the defendant, for or by reason of the *facts* which constitute his cause of action; and a *demande* is therefore said to be "the exercise of a right of action." (a) The term *defense*, on the other hand, implies all that the defendant offers, by way of opposition or resistance, against the plaintiff's *demande*. (b) The matters which constitute the *demande* and the *defense*, in any case, are respectively set forth in the pleadings of the parties, which vary according to the grounds upon which they are made, and the objects they are designed to attain. Pleading, therefore, is the statement of

(a) 7. Pigeau. 33.

(b) 1 Pothier 4to. 14. Code Civile 5. Tit. Art. 1st and 5th.

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To this exception the plaintiff answered specially, alleging that the defendant was incapable of holding real estate, because he was an alien, born in France, and had never been naturalized, and upon these allegations

the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence, exhibited in writing in technical form. It is the mode of alleging that, which is afterwards to become in evidence the support of the party by whom it is alleged, (c) or, a simple negatur of that which is alleged by an adversary; the former being an affirmative, the latter a negative pleading. (d) An affirmative pleading consists of two parts, the *libel* and the *conclusion*. In the libel,—or *narration* as it is sometimes called,—the facts which constitute the grounds of the pleading, that is to say, the premises, from which the conclusions in law are to follow, are alleged and set forth distinctly as to time, place, person and circumstance; (e) without comment or argument of any kind. (f) And to the libel, which should contain all that is necessary to justify the conclusion and no more, is added the prayer of the pleader, in apt words, for that specific remedy or relief, to which by law, the facts which he has libelled entitle him, and this is the conclusion. (g) A negative pleading, in like manner, consists of two parts; of a direct denegation of that to which it answers, and of the conclusion, which asks that relief or remedy to which the pleader will be by law entitled, if that which he denies, be not verified.

In the law of England it is a general rule in pleading, "That a mere prayer for judgment without pointing out the appropriate remedy, is sufficient, and that the facts being shewn, the court, *ex officio*, is bound to pronounce the proper judgment." (h) But the reverse of this rule is the principle of the law of Canada. With us the conclusions are held to be essential to the proceedings, (i) and must contain, *à peine de nullité*, all that the judgment of the court must comprehend. (k) For although the conclusions may by the court be allowed or rejected *in toto*, or modified and allowed in part, and rejected in part, (l) still what is omitted in the conclusions cannot be supplied by the court, not even if it appears in substance in the body, or libel, of the pleading. (m)

The *declaration* is the first pleading in every case. It sets forth the facts which constitute the plaintiff's *demande*, and is always an affirmative pleading. *Pleas* are the pleadings, which set forth the *defense* of the defendant, and these are sometimes negative, and sometimes affirmative. A negative plea denies the matters which constitute the grounds or *fonds* of the plaintiff's *demande*, and does no more; but an affirmative plea alleges some new

(c) 3. T. Rep. 159. Doug. 278.....(d) Hennecius in Pandectas, part. 2. S. 32. Brown's Civil Law, V. I. p. 35.....(e) 1. Pigeau 296. 270. 1. Gauret, 4. Code Civile, Tit. 2. Art. 1. & Tit. 20 Art. 1.

(f) 7th Pothier, 4to. 55. Art. 4. c. 3. Code Civile, Tit. 20. Art. 1.

(g) Repertoire, Verbo, *Conclure* 8vo. V. 14. p. 77.


(h) 4th East 502, 509. 5th. Ib. 270, 271. 1st. Chitty, 243, 445.

(i) 14 Vol. Repertoire 8vo. p. 77. Verbo. *Conclure*.

(k) 14th Vol. Repertoire 8vo. p. 78. Code Civile, Tit. 2d. Art. 1st.

(l) 14. Vol. Repertoire p. 78 and 17. Vol. p. 479. Verbo *Demande*. L. C. Denizart, Verbo. *Conclusions*. Vol. 5. p. 83. No. 2.....(m) 14. Vol. Repertoire, 8vo. p. 76, 78. 1. Pigeau, 399. 400.

the defendant took issue by simple denegation of the facts. At the hearing the advocate general (Pyke,) for the defendant, complained of the operation of the Ordinance 25. Geo. III. c. 2. § 13. which enacts, " that

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matter, which being proved, is of itself sufficient to authorise a judgment for the defendant, notwithstanding the matters which constitute the ground or fonds of the plaintiff's demande ; and for the purpose of this distinction, the word défense is used in a second and limited sense ; a negative plea being called a " défense au fonds," because it impeaches or denies the ground or fonds of the plaintiff's demande set forth in his declaration, in opposition to an affirmative plea which is called an exception, (from the Latin excipere to exclude) because it does not impeach or deny the ground or fonds of the plaintiff's demande, set forth in his declaration, but alleges, and relies entirely upon one or more new matters as cause why the plaintiff's suit should be delayed or dismissed, (n) and hence the maxim reus excipiendo fit actor. (n n)

The remaining pleadings known in the law of Canada, are *answers* and *replications*, the pleading which is put in by a plaintiff, in answer to an affirmative plea filed by a defendant being an *answer* ; and the pleading, which is put in by a plaintiff, in reply to a negative plea, or by a defendant, in reply to a plaintiff's answer to an affirmative plea, being a *replication*. (o) Thus much being generally premised with respect to the pleadings which occur in the course of ordinary suits, the nature of each may now be more particularly considered.

The *declaration* is a specification of the matters that constitute the plaintiff's cause of action, an accurate and logical statement of his complaint or charge against the defendant, and of the remedy in law for which he demands judgment. In this pleading the plaintiff is required, *à peine de nullité*, to narrate and libel distinctly, as to time, place, person, and circumstance, the several facts upon which he prosecutes, and which he intends to prove in evidence ; (p) all of which he therefore offers " to verify, prove and maintain when and as the court shall direct ;" averring the whole " to be well founded in fact and in law ;" and praying by his conclusion, that the court, under the authority of its jurisdiction, will " compel the defendant to appear," and, " to answer unto him the plaintiff, of (i. e. concerning) the *demande*, contained in his declaration," and will award to him the appropriate remedy in law, which he specifically sets forth and alleges to be the legal result of the premises. (q) By the King's writ or process *ad respondendum*, the defendant is summoned to appear and to *answer* to the *demande* of the plaintiff, contained in his " declaration ;" (r) and if he appears, (to

(n) Heineccius *Elementa Jur. Civ.* p. 395. Tit. 13. Art. 1277. Heineccius in *Pandectas* part 2. S. 42: 7. Pothier, 4to. 14. De la Jannès, Vol. II. p. 406. Tit. 29. Art. 629. L. C. Denizart, Vol. 8. p. 166. Verbo, *Exceptions*, Sec. 1. No. 1. 1. Pigeau. 150. Jousse, *idée de la Justice Civile*. Tit. 3. part 2. Sec. 1. Art. 5, page 63. Erskine's *Institutes*, p. 663.

(n n) *Repert. 8vo.* Vol. 4. p. 363. Jousse *idée de la Justice Civile*. p. 63. (o) *Prov. Ord.* 25. Geo. 3. c. 2. s. 13.....(p) *Code Civile*. Tit. 11. Art. 1. 1. Gauret, 4. *Repertoire*, 2. Vol. 8vo. p. 4. Verbo *ajournement*.

(q) *Rules and orders*, p. 233.....(r) *Ib.* p. 191.

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every issue in law or fact, shall be made and completed by the declaration, answer and replication; or by the plea, answer and replication, in cases of abatement and bar, and that no other or further pleadings, or writings

prevent a judgment against him by proceedings *ex parte* he *must answer*, or shew "*that by law he is not bound to answer.*"

This constitutes the first great division in pleas; for, as it would be contrary to law, to compel a defendant to answer to a *demande*, who is not bound by law to do so, and consequently what no court lawfully can do; "whether he be or be not bound to answer," must necessarily be a *preliminary inquiry* in all cases in which the defendant contends, "that he is not bound to answer." For which reasons, if he does contend, "that he is not by law bound to answer," he is required to file, in *limine litis*, his plea or pleas to this effect, *without answering the demande*; and from hence such pleas are sometimes called "*preliminary pleas.*" (s) But as the principal allegation of every such plea is, "that in this cause, the court of our Lord the King now here, *by law cannot proceed,*" (t) they are more technically distinguished from pleas which answer the *demande* (and are thence called "*pleas to the action*") by the title of "*fin de non procéder.*" (u) A preliminary plea, or "*Fin de non procéder,*" from its nature, cannot, in any case, be a negative plea. A negative plea necessarily takes issue upon the facts stated in the declaration, and the defendant, by such a plea, instead of shewing "that he is not by law bound to answer," would in fact answer the "*demande.*" As the defendant must therefore plead affirmatively, the matter on which he relies for the support of his averment, ("that he is not by law bound to answer") all *fin de non procéder* are *exceptions*. For the same reason, (that is, because they cannot answer the *demande*, *Fin de non procéder* cannot put in issue the right of action, as it respects either of the parties, or the subject of the suit; they have, in truth, relation to the court only, and are founded upon the principle of *some defect of authority in the court to compel an answer*; (w) the matter, which they allege, tending upon this ground solely, "*to defeat the present proceeding,*" without inquiry whether the plaintiff hath, or hath not, a right of action; (x) and therefore, *fin de non procéder* do not pray, "that the action may be dismissed;" but, "that the writ and process *ad respondendum*, and the declaration, and each "of them, be declared null and of no effect whatever," or, "that all proceedings be staid until &c." according to the legal import, and effect of the matter pleaded. (y)

Fin de non procéder are divided into three classes, and have reference,—To the jurisdiction of the court,—to the form of the proceedings, or to some exemption from the common obligation to answer, to which the defendant is entitled.

The defendant therefore may show, that he is not by law bound to answer

(s) Rules and orders, sec 7. Art. 7. p. 68.

(t) *Ib.* p. 234, 235.....(u) L. C. Denizart. Vol. 8. p. 638. Verbo, *Fin de non procéder*. S. 1..... Serpillon, p. 54. Note 2. Jousse Cod. Civ. Vol. I. p. 182. Repertoire, Vol. 25, 8vo. p. 62.

(w) Serpillon, p. 54. Note 2.....(x) *Ib.* p. 54. Note 2d.

(y) Rules and orders. p. 236. 1 Fig. 162.

by way of plea upon such issue or matter in dispute, shall be received;”—he said that by this clause he had been compelled to take issue upon a fact which he could not deny, viz: “that the defendant was born in

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to the *demande* of the plaintiff in his declaration contained, by pleading.

1. That by reason of some matter, which he (the defendant) alleges and sets forth, “The court by law cannot proceed in the cause, nor compel him to answer in any manner unto the *demande*, nor in any way take cognizance of the action of the plaintiff, if any he hath, &c.” (z) *for want of jurisdiction*; and this is the *exception declinatoire*. (a)

2. That by reason of some *imperfection, defect or want of form* in the proceedings, i. e., apparent upon the face of the proceedings, 7th Pothier. 15. as in the writ of declaration, which he specifically sets forth, and of some law rule or order, which he also sets forth, “the court cannot proceed in the cause nor compel him to answer, in any manner, unto the *demande*,” because the proceedings are null; and this is the *exception à la forme*. (b)

3. That by reason of some matter which he alleges and sets out, “the court cannot, at this time, proceed in the cause, nor compel him to answer in any manner unto the *demande*,” because the matter so pleaded is such as entitles the defendant, at this time by law, to an exemption from the common obligation to answer; and this is the *exception dilatoire*. (c)

When *fins de non procéder* are allowed, the *instance* or suit is either suspended until the court has authority to proceed, and to compel an answer, or the writ and process *ad respondendum*, and the declaration are declared to be null and of no effect; the defendant in the latter case being discharged or dismissed out of court, and the plaintiff obliged to sue out a new process *ad respondendum*; but when they are overruled as frivolous, the defendant, within the time limited by the practice of the court, is bound “to answer to the plaintiff of the *demande* contained in his declaration,” by a *plea to the action*, of which we will now enquire. (d)

As that is a preliminary plea, or *fins de non procéder*, which questions the authority of the court to compel an answer, and does not put in issue the right of action as it respects either of the parties to the suit, or the subject matter of the suit; so *e converso*, a plea to the action is that which does put in issue the right of action as it respects the parties, or the subject matter of the suit, and does not question the authority of the court in any manner.

The right of action is put in issue by a negative plea, denying the case stated in the declaration, in point of fact, or in point of law; and all such pleas are “*défenses au fonds*,” for as they contest the very ground or *fonds* of the plaintiff’s *demande*, by denying the truth of the facts set forth in his declaration, or the validity of the law which he avers to be the result of the

(z) Rules and orders, p. 234.....(a) L. C. Denizart. Vol. 8. p. 638. Verbo *Fins de non procéder*, Sec. 2. 7. Pothier, 17. Jousse C. C. Vol. 1. p. 182. Repertoire. Verbo Fin. Vol. 25. 8vo. p. 62. Serpillon, p. 54. n. 2.

(b) Rules and Orders, p. 236. Jousse C. C. Vol. I. p. 182. L. C. Denizart, Verbo, Fins de non procéder, S. 2. Vol. 8. p. 638. Repertoire, Verbo, Fin. Vol. 25, 8vo. p. 62. 7 Pothier, 15.....(c) L. C. Denizart, Vol. 8. p. 638. Verbo, Fins de non procéder, S. 1 and 2. Repertoire, Verbo, Fin, Vol. 25, 8vo. p. 62. 7 Pothier 16.

(d) Rules and orders, Sec. 7. Art. 8 and 9, p. 68, 69.

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France," and had been deprived of the opportunity of setting forth the circumstances, which shewed, that notwithstanding that fact, he was born a subject to His Majesty, that true it was he had been born in France,

facts set forth,—they are distinguished from other pleas and from the aggregate of pleas, (which is implied by the word *défense* in its general acceptance,) by the particular descriptive title of "*defenses au fonds*." (e) The right of action is also put in issue by any affirmative plea, which sets forth and pleads any matter relating either to the parties, or to the subject of the suit, which of itself is sufficient *in law* to authorise a judgment for the defendant, notwithstanding the facts set forth in the declaration of the plaintiff; and all such pleas, for the reasons before given, are *exceptions*; (f) but as exceptions of this kind have a *tendency in law* to bar the plaintiff's action for ever, or to abate it, until the disability, or other effect of the matter pleaded, shall be removed, they are distinguished from that class of exceptions, which under the title of preliminary pleas, or *fins de non procéder*, tend merely to show, that the defendant is not bound to answer; by the descriptive title of "*exceptions péremptoires en droit*;" the word *péremptoire* (from the Latin *perimere* to destroy) being used to express their legal effect. (g)

It is obvious that a defendant can have but two sources of defence, his own strength, and the weakness of his adversary; and consequently all pleas to the action must be either "*exceptions péremptoires en droit*," or "*defenses au fonds*;" the former comprehending all pleas to the action which are founded upon the defendant's own strength, that is, upon new facts not stated in the declaration, upon which, (having set them forth) they *tender an issue* to the plaintiff: the latter comprehending all pleas to the action which are founded upon the weakness of the plaintiff, that is, upon the intrinsic inefficiency of the case, which he sets forth in his declaration, in fact or in law, upon which *they take issue*.

As every *défense au fonds* refers entirely to the matter which is stated in the declaration, and is grounded wholly upon the insufficiency of that matter in point of fact, or in point of law, to support the plaintiff's suit, a direct denegation of the fact, or of the law, is all that is requisite in such pleas, to put the right of action safely in issue, with respect to the defendant, and to throw the *onus probandi* upon the plaintiff. But where the *demande* must be answered by new facts, not stated in the declaration, the defendant, for his own safety, must necessarily set them forth with certainty as to time, place, person, and circumstance; for if he does not, the facts, on which he relies for his defence, cannot benefit him, because they cannot be shewn to the court in evidence; it being one among the first principles of pleading, that the court must judge *secundum allegata et probata*; and that although facts only should be stated in pleading, yet, all material facts must be set out, to enable the court to declare the law, which arises upon such facts, and authorises a judgment for the defendant, (notwithstanding the facts set forth in the plaintiff's declaration,) and to apprise the plaintiff of what is meant to be proved, and thereby enable him to deny what is alleged, or to aver new matter in answer

(e) 7 Pothier, 14. (f) Vide Ante. (g) 1, Bornier, 39. 1. Pigeau, 151.

but that he was there born of British parents of the name of Sinclair, who were there accidentally and for a short time only, and were driven thither by stress of weather from the high seas, this he said he was pre-

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to it, and to come prepared with proof, according to the exigencies of the case. (h)

Pleas of "*défense au fonds*" are divided into two classes. 1. "*Défense au fonds en droit*," which denies the law averred by the plaintiff to be the result of the matters stated in the declaration, (i) and 2. "*Défense au fonds en fait*," which denies the truth of the matters stated in the declaration. (k) In the *défense au fonds en droit*, the defendant, for "answer au fonds to" "the demande of the plaintiff in his declaration contained," avers, "that the allegations of the plaintiff and the matters and things in his declaration set forth and contained, and each and every of them, is and are wholly and altogether unfounded in law and not sufficient therein for the plaintiff to have or maintain, against him the defendant, the conclusions in his declaration taken, or any or either of them, or the action of him the said plaintiff in this behalf," and therefore (by his conclusions) "he prays that by the judgment of the court, the action of the plaintiff in this behalf may be dismissed." (l) In the *défense au fonds en fait* the defendant, in like manner, "for answer au fonds to the demande of the plaintiff in his declaration contained," avers, "that the allegations of the plaintiff, and the matters and things in the said declaration contained, and each and every of them is and are wholly and altogether unfounded in fact and untrue, &c. and therefore" (by his conclusion) "he prays that by the judgment of the court, the action of him the said plaintiff in this behalf be dismissed." (m)

Pleas of "*exceptions péremptoires en droit*" are, in like manner, divided into two classes, 1. PERPETUAL (n) *exceptions péremptoires en droit*, and 2. TEMPORARY *exceptions péremptoires en droit*; and these distinguishing titles are derived from the legal effect of these pleas respectively. Both are equally peremptory because both equally destroy the action to which they are pleaded, but their ulterior effect is not the same. A judgment, in favor of the defendant, upon a perpetual *exception péremptoire en droit*, is a perpetual bar to the action in which it is pronounced, and hence the name of "*exception perpétuelle*." But a judgment, in favor of a defendant, upon a temporary *exception péremptoire en droit*, does no more than abate the plaintiff's action, until the disability, or other effect of the matter pleaded and allowed, (n n)

(h) Code Civile, Tit. 20, Art. 1. Chitty, 217...(i) 7 Pothier, 14...(k) Ib.

(l) Rules and Orders, p. 244.....(m) Ib. p. 246.

(n) See 1. Pigeau, p. 150. "Ces moyens sont appellés exceptions du Latin *excipere* (exclure) parceque ils tendent a exclure le demandeur de poursuivre sa demande soit pour un temps, soit pour toujours."

(n n) 1. Jousse, C. C., 189. The Epithets "perpetuæ," and "temporales," were app'ied to exceptions in the Roman law. Vide Harris's Justinian's Institutes, Lib. 4, Tit. 13, § X, p. 341.—Pothier's Pandects. vol. 3, p. 251.—Ferrières Just. Instit. vol. 6, p. 274 to 278,—and Brown's practice of the Civil Law, 1st edit. vol. 2nd. p. 32. The same distinction prevails in the Law of England between abatement and bar, which are sometimes called temporary bar and perpetual bar.—Vide Le Bret v. Papillon, 4. East, 505.

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pared to shew, and that the place of the defendand's nativity was a British ship in the harbour of Dunkirk : that the greatest injustice would be done to the defendand, if he could not be permitted to plead, and to prove

is removed, and therefore, it is a bar to the action *for a time only*, and hence the title of *exception temporaire*. A plea *ad instantiam perimendam* ;

In the perpetual *exception péremptoire en droit*, the defendant, "for answer, unto the *demande* of the plaintiff in his declaration contained," sets forth and libels the special facts which constitute the ground of his exception, which he offers to prove "when and as the court shall direct," averring that by reason thereof, "the plaintiff *by law* cannot at any time, have or maintain any action against him the defendant, for or by reason of the matters or things in his declaration set forth and alleged, or of any or either of them ;" and therefore (by his conclusion,) he prays "that for the causes aforesaid, by the judgment of the court, the action of the plaintiff in this behalf may be dismissed." (o) In the *temporary exception péremptoire en droit*, the defendant, in like manner, "for answer unto the *demande* of the plaintiff in his declaration contained," sets forth and libels the special facts, which constitute the ground of the exception, which he offers "to prove when and as the court shall direct," averring that by reason thereof, "The plaintiff *by law* cannot, at this time, have or maintain his action, against him the defendant, for or by reason of the matters and things in his declaration set forth and alleged, or of any or either of them," and therefore by his conclusions he prays, "that for the causes aforesaid, by the judgment of the court, the action of the plaintiff in this behalf be, for the present, (p) dismissed.

Exceptions péremptoires en droit do not impeach or deny the case stated in the declaration, and therefore cannot in any instance involve, or call for any consideration of the intrinsic merits of that case, as the *exceptio* of the Roman law and the plea in Chancery, "they insist that the matter of the *demande* is not to be put in issue." Gilbert's *Forum Romanum*, p. 64. They invariably set forth some new matter which shows, (notwithstanding the matter set forth in the declaration) that the plaintiff's action must by law be dismissed, for the present, or for ever. (q) But as the new matter, which they set forth, is sometimes foreign to the matter set forth in the declaration, and sometimes connected with it, sometimes have reference to the merits of the plaintiff's demand and sometimes have none, they are distinguished (by reference to that which they allege, and on which they are respectively founded) into "*fins de non recevoir*," and "*fins de non valoir*," (r) those *exceptions* are *fins de non recevoir* in which the matter set forth is sufficient in law (whether the case stated in the declaration be

(o) Rules and Orders, 243, 244.....(p) Rules and Orders, 241, 242. 2. Pothier, 4to. p. 729. 1. Pigeau, 199. Repertoire, 8vo. vol. 17. p. 479. Verbo. Demande.

(q) The office of a plea in bar at law or in equity is to confess the right to sue avoiding that by matter *dehors*—giving the plaintiff an acknowledgment of his right independent of the matter alleged by the plea—that is, the plea admits the bill but interposes matter, which if true, destroys it.

Per Lord Chancellor—6. Vesey, junr. 597.

(r) 1. Bornier, 39. note 1.

these facts, he would lose his property and his character of a British subject, although he was manifestly entitled to both.

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true or false) to authorise a judgment in the defendant's favor, dismissing the plaintiff's action for the present, or for ever, as where the defendant pleads, that the plaintiff is an *alien enemy* which is a *temporary exception péremptoire en droit* or pleads the long *prescription* of thirty years, which is a *perpetual exception péremptoire en droit*; (s) and such exceptions are denominated *fins de non recevoir*, because the matter, which they plead, shews that the plaintiff cannot legally be received, or admitted by the court to prosecute the suit which he has instituted. (t) Those exceptions, on the other hand, are *fins de non valoir* in which the matter set forth necessarily admits and confesses the case stated in the declaration, but avoids or discharges it, for the present, or for ever, and is therefore sufficient in law to authorise a judgment in the defendant's favor dismissing the plaintiff's action; as where the defendant pleads "Term for payment unexpired," which is an *exception péremptoire en droit temporaire*, or pleads "accord and satisfaction," or "chose jugée (*res judicata*)" which are *exceptions péremptoires en droit perpétuelles*, and such exceptions are denominated "*fins de non valoir*," because the matter, which they plead, shews that although the plaintiff may have a legal cause of action hereafter, or heretofore had a legal cause of action, yet, that he cannot now avail himself of it. (u) *Fins de non recevoir*, and *fins de non valoir*, are thus sometimes, in their effect, perpetual, sometimes temporary; but the classes of *exceptions péremptoires en droit perpétuelles*, and *exceptions péremptoires en droit temporaires*, comprehend the entire list of *fins de non recevoir* and *fins de non valoir*, and the two latter are therefore subdivisions, only, of the two former. (v)

To pleas of *défense au fonds en droit*, or *en fait*, because they are negative pleas and take issue, nothing can be offered on the part of the plaintiff but a general replication, (w) by which the issue being completed, the pleadings are concluded. But to pleas of exception, because they are affirmative pleadings, and tender an issue, the plaintiff must put in an answer, which is either general or special.

A general answer takes issue upon the matter of the exception, by a general denegation; (x) and such general answer completes the issue, and consequently concludes the pleadings; (y) but a special answer tenders a new issue by setting forth fresh matter in answer to the matter of the

(s) 1. Pothier, 346.....(t) 1. Pigeau, 165. 8. L. C. Den. p. 638.

(u) Rodier, 75. 1. Bornier, 39. It is a rule in English pleading, that a party justifying, must admit the fact, 3rd T. R. p. 298. Taylor v. Cole. Every plea in justification, says Serjeant Williams in Saunders, states circumstances which either excuse the fact complained of or shew it to be lawful.—From its nature therefore, it must confess the fact, otherwise it is no justification, but a denial, of the fact, and amounts to the general issue. Williams's Saunders, vol. 1. p. 28. note 1. and 14. note 3. cites Taylor v. Cole. 3. T. R. 298—Gibbons v. Pepper. 1. L. Raym. 38. 3. Wils. 411. 412.(v) Rodier, 75. 76.....(w) Rules and Orders, 231.....(x) Rules and Orders, 220. 222, 224.....(y) Rules and Orders, sec. 7, art. 21, p. 76.

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exception, which is sufficient to destroy it, and in such case, the issue is not completed, by a general replication, on the part of the defendant, to such special answer, (z) although the Legislature has forbid the use of all further pleadings. (a)

The principles which I have stated decide the present case. The declaration demands of the defendant a large sum of money, for the sale and delivery of a quantity of timber, under a special contract in writing. To this, the defendant has filed a plea which he has intitled a *défense au fonds en fait*, in which he pleads specially; 1. That he is not indebted, does not owe, and did not undertake, as in the declaration is alleged. 2. That he has not failed, or made default, in the performance of the agreement declared on. 3. That no greater quantity of pine timber, than that expressed in the agreement, has been delivered to, or received by him. 4. That he has paid in part for the 20,000 feet of pine and 6,700 staves delivered, and that he made a tender of the balance due which the plaintiff had refused before the institution of the action.

Of these answers to the declaration, three, viz.; the 1st. 2nd. and 3rd. amount to the *défense au fonds en fait*, and to no more. They are merely negative. They deny the allegations of the declaration, and disaffirm the very matter which the plaintiff, on the general issue would be bound to prove, in the first instance, in support of his action; and as this is all that they do, they ought to have been pleaded generally, in the form prescribed by the rules and orders for the *défense au fonds en fait*. A defendant cannot be permitted to plead specially that which amounts to no more than a total denial of the charge.

Of the remaining answers, one alleges payment, and the other a tender or *offres*. Now, a plea of payment is a *perpetual exception péremptoire en droit*; (b) it is so, because it does not impeach, or deny, the ground or *fonds* of the plaintiff's *demande*, but on the contrary admits a cause of action, and discharges it by new matter, which is not stated in the declaration, and which consequently it sets out, that new matter being a legal "*fin de non valoir*." To plead payment of a debt and at the same time to deny its existence is inconsistent; payment, therefore, ought not to have been pleaded by way of *défense au fonds*, but by way of *exception*; in the form of the *perpetual exception péremptoire en droit* prescribed by the rules and orders. And the tender, or *offres*, for the balance, which is alleged, ought to have been pleaded in the same manner, because an *offre valable*, or tender validly made, is in law equivalent to payment. (c) The plea therefore is entirely defective.

The defendant by pleading payment, and tender, by way of *défense au fonds*, deprived the plaintiffs of the benefit of putting in "an answer" to the new matter of his plea, to which they were entitled, and drove them to the necessity (if they noticed the plea at all) of filing a general replica-

(z) 1b. 229.....(a) Ord. 25, Geo. III. c. 2. s. 13.....(b) 1. Pigeau, 203; 1. Bornier, 39; 2. Argou, 473; 2. Domat, 230.....(c) 1. Poth. Obligations, No. 573.

nance, in order to prevent all unnecessary prolixity in pleadings, has provided "that every issue shall be made" and completed by the plea, answer and replication, "in cases of abatement and bar," and in all instances in which from the nature of the case the issue is, or can properly be raised by a plea to the declaration, an answer thereto, and a replication, no further pleadings or writings by way of plea upon such issue, can be received, and none ought to be received, because an issue is already perfected. But in cases in which from the nature of the facts an issue cannot properly be raised by these pleadings, it would be absurd to say that the Ordinance intends to exclude all further pleadings and there to terminate the cause. Can it be supposed that the law-giver meant to deprive the parties in any suit, of the natural right of stating their own case in the way which their interests fairly require, or to compel them to raise issues upon facts which they cannot controvert without injury to their pretensions? Surely it cannot be. The intention of the Ordinance is to prevent all unnecessary prolixity and confusion in pleading. It therefore, forbids the admission of further pleadings in all cases in which an issue has already been raised, by enacting "that no further

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tion, that being the only pleading to a *défense au fonds en fait* permitted by the rules. (d) On the other hand, the plaintiffs, instead of taking advantage of the defendant's misconduct, as they might have done, have filed a replication to his plea, and they are thus as much in fault as the defendant; both parties have equally contributed to the irregularity of the pleadings, and a repleader, from the declaration, must therefore be ordered, that being the point of pleading at which their mutual error commenced.

A Repleader ordered.*

(d) Rules and Orders 231.

* This case was reported by the present Mr. JUSTICE PYKE in his Reports and is here given with some original notes of the Judgment.

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pleadings or writings, by way of plea" shall be received. But as to further pleadings in cases in which no issue has been raised, it is silent. How can such further pleadings be pleadings upon an issue, where there is no issue? When facts are set forth affirmatively in a plea of exception, the facts which have been previously stated in the declaration are either admitted to be true, or it becomes indifferent whether they are true or false, and thus they cease to be objects of contest or inquiry in the cause. By the exception, an issue on the matter which it alleges is tendered to the plaintiff, and if that matter is denied to be true by his answer, an issue is raised upon it. But if on the contrary he admits it to be true, and in a special answer states other facts which shew that it cannot prevail, the issue thus tendered by the defendant is refused, the matter stated in the exception ceases also to be an object of contest or inquiry in the cause, and a new issue on the facts which are alleged in the plaintiff's special answer, is tendered to the defendant. These facts may of course be again admitted in their turn to be true, and their effect may be destroyed by new matter alleged in a special replication; and where this is the case, if the plaintiff is not permitted to answer this new matter, it is plain that as there is yet no controversy between the parties, there is not, and cannot be an issue for trial, or a decision in the cause. To prevent a denial of justice therefore, a "further pleading," or "writing by way of a plea," to the matter alleged in the special replication, in such cases must necessarily be allowed, and this, if it be not according to the strict letter, is, nevertheless, the spirit of the Ordinance; for facts affirmatively stated in any pleading, subsequent

to the declaration, and in answer to any matter which is alleged in a preceding pleading, are pleaded by way of exception "in bar" to such matter. If the facts set forth in a special replication in any case, in which no issue has previously been raised, are denied in the answer thereunto given, and a general replication is thereupon filed, the issue is raised, as the Ordinance requires in cases of bar and abatement, viz: by the plea in which such facts are so alleged by way of exception, by the answer thereto and by the replication.

In the present case the plaintiff sues for a piece of land and dwelling house as the heir of Françoise Pacquet "*en petition d'hérédité*."—To this demand the defendant pleads title by the last will and testament of Pacquet, by a perpetual peremptory exception. The plaintiff's answer to this exception admits the will, but alleges that the defendant was born in France, and being, therefore, an alien, is incapable of inheriting real property by will, or otherwise, and upon this the issue has been joined. Both parties admit that it is irregular, and well they may, for it is directly contrary to the facts of their case. The defendant, by a special replication, should have admitted that he was born in France, and thereupon alleged, as he has verbally stated, that he was there born of British parents, who at the time of his birth were temporarily and accidentally in France, and had been driven thither by stress of weather from the high seas: and upon this allegation, which constitutes the true and only point of controversy between the parties, the plaintiff would have taken issue by an answer denying it to be true, and by a replication (if such pleading be necessary,) the issue would have been joined and completed.

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To enable the parties to adopt this course, and to put the cause upon its proper footing, there ought to be a repleader.

A repleader from the perpetual exception ordered.

EXPARTE SAMUEL WENTWORTH MONK.

22nd March,
 1817.

A prisoner committed by the Assembly to the common gaol "during pleasure," is discharged by a prorogation.

DURING the session of the provincial parliament in 1817, Samuel Wentworth Monk was committed by the Assembly to the common gaol of the district *during pleasure* for a contempt. The parliament was prorogued on the 22d day of March, and on that day the court,—then sitting for the trial of crimes and criminal offences,—on motion, granted a writ of *habeas corpus*, and the above cause of detention being returned, it was moved that Samuel Wentworth Monk be discharged.

Per curiam.—The Counsel for Mr. Monk have avoided all arguments upon his commitment and upon the inaccuracies, if any, of the warrant by which he was confined; and in so doing they have acted rightly. It is laid down as a settled principle by Hawkins, "that
 " a person committed for contempt by the order of
 " either house of parliament, may be discharged by
 " the court of King's bench, after a dissolution or pro-

“rogation of the parliament:”—“For” as he observes, “all orders of parliament are determined, by a dissolution or prorogation, and all matters before either house must be commenced *de novo* at the next parliament, except only the case of a writ of error.” (a) An exception to which, impeachments, was added by the decision of the Commons in the case of *Warren Hastings*. (b) By modern cases this principle has been confirmed, and the decisions in the case of the *Queen v. Paty*, (c) of *Brass Crosby*, (d) and of *Sir Francis Burdett*, (e) have put it beyond all doubt. The question before us is thus limited to the enquiry, “whether the provincial parliament is prorogued,” and independent of the proof that it has been this day prorogued, contained in the affidavit before us, it is a fact which with the passing of the acts of the Legislature, we are bound to notice. Without determining therefore, whether the detention of Mr. Monk was legal or illegal, whether the warrant, by which he is detained, is accurate or inaccurate, in point of form, or whether his commitment in any respect was right or wrong, we must discharge him upon the ground that the period for which he was committed has expired.

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(a) 2. Hawk. P. C. cap. 15. § 74. (b) 4. Black. Com. 399. Note (2.)

(c) Ld. Raymond, 1106. 1108.

(d) 3. Wilson, 188. 11, Hargrave's state trials, 335.

(e) 14 East. 1 and 163.—5. Dow's Parl. Cases 165. 199.—See also the judgment of the Supreme Court of the United States in *Anderson v. Dunn*, 6 Wheat, Rep. 204. 1 Kent's Comm. Lect. 11, p. 221. and 2. Story's Comm. on the Constitution of the United States, p. 308. The English Law Magazine for July 1831, p. 1, contains also a learned article on this subject.

POZER AND ANOTHER *against* CLAPHAM.

20th June,
1817.

In a commercial matter, if it appears, in an action of assumpsit, at the trial, that the plaintiff has a partner who was a party to the contract, and is not a party to the suit, the action will be dismissed although the defendant has not pleaded the facts.

THIS was an action brought by two copartners in trade against the defendant, a merchant, to recover from him a certain sum which the former alleged had been overpaid to him, upon the sale of a bale of Flushings effected by the plaintiffs for the defendant at auction, and at the trial it was proved that the plaintiffs had another partner who was a party in the whole transaction.

Per curiam. This is clearly a commercial matter, *

* In the case of *Pozer v. Meiklejohn*, decided in the court of King's Bench at Quebec, on the 14th day of April 1809, it was held "that the transactions of tradesmen and artisans, in the way of their trade, are to be considered as commercial matters, and in all actions brought upon such transactions, recourse must be had to the English rules of evidence under the Ord. 25. Geo. III. c. 2. § 10. and generally in all cases which by the law of France were cognizable by the consular jurisdiction."

In this case it was objected at the *enquête*, on the part of the defendant, that the case was not commercial, and that the evidence, offered by the plaintiff, was inadmissible under the law of the country, in force at the time of the conquest, and thereupon the following opinion of the court was delivered by

SEWELL, CH. J. The plaintiff Pozer is a merchant, and alleges in his declaration that having purchased 77 hogsheads of beer, he stored them in the cellars of the defendant, *Meiklejohn*, who is a brewer, and he demands the value of the beer and of the casks, on the ground of *Meiklejohn's* refusal to deliver them. *Meiklejohn*, on his part, admits the receipt of the beer, and of the casks, also his refusal to deliver them, in which he persists, alleging that *Pozer* after storing them in his cellars, upon his own account, sold the whole to him, and that he is ready to pay the price at which he purchased. These allegations are denied by *Pozer*, and the principal enquiry therefore, will be whether the beer and casks were or were not so sold to *Meiklejohn*. But the immediate question, that which we are now called upon to decide turns upon the evidence offered by the plaintiff; and we are to determine whether, in this cause, recourse shall be had to the common law of Canada, that is, to that law which was in force in the province at the conquest; or to the "rules of evidence laid down by the laws of England." A recourse to the common law of Canada is the ordinary rule, an exception was created by statute for those cases in which "proof is to be made of facts concerning commercial matters." The 10th section of the Ord. 25. Geo. III. c. 2. having enacted that "in proof of all facts concerning

and consequently as the proof must be weighed according to the rules of evidence laid down by the laws of England, it follows that the contract laid in the declaration is not proved, the contract in evidence be-

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"commercial matters, recourse shall be had, in all the courts of civil jurisdiction in this province, to the rules of evidence laid down by the laws of England." If therefore, the facts in this case be facts concerning commercial matters, we must be governed by the law of England, if not, by the common law of Canada.

In France, before the establishment of the sovereign council of Quebec, and particularly in the *Vicomté* of Paris, there were peculiar jurisdictions,—*Juges Consuls*,—who were appointed to decide "*les affaires de commerce*." 1. *Juris Consul*. 1. — It is true that in the provinces or districts of France in which no *Juges Consuls* were appointed, all "*affaires de commerce*" as well as ordinary matters were heard and determined by the ordinary courts of law. 2. *Pig. 130.*—but it is equally true that when they were appointed, they held the exclusive cognizance of all commercial matters in dispute, and of no other. *L. C. Den, v. Consuls des marchands, s. 1. 2.* — Every matter in dispute therefore, to which the jurisdiction of the *Juges Consuls* extended, was according to the law of France, a commercial matter or case, and all the facts relating to such matters were consequently "*facts concerning commercial matters*." Now the system of jurisprudence which we administer has for its basis the law of France, and particularly that portion of the law of France which was observed as law, in the *Vicomté* of Paris, before the establishment of the sovereign council of Quebec; and as the distinction, between commercial and ordinary matters, is thus known in the law of Canada, it is a safe course for the legal interpretation of the new rule which, in such general terms is prescribed by the Ordinance, to enquire whether the case be, or be not a matter which would have been cognizable in the jurisdiction of the *Juges Consuls* as a commercial matter, that being the best criterion by which we may decide whether the facts of the case be, or be not "*facts concerning a commercial matter*." The 16th title of the *Code Civile* prescribes "*la forme de procéder*," that is, the practice in the courts of the *Juges Consuls*, and it is undoubtedly a fact that the whole of this title was abolished by the *redaction*, "*attendu que cette jurisprudence n'est point établie dans le pays*," 1. *Edits et Ordon. 140.* But this does not affect the conclusion to be taken; the enquiry is what, according to the law of Canada, was an *affaire de commerce*, or commercial matter? and not what was the practice or *forme de procéder* in a commercial matter? What was a commercial matter according to that portion of the law of France, which was in force in Canada, was such by the law of Canada, and although every such case was cognizable in the ordinary courts, yet if a Consular Jurisdiction had been created it would have claimed, and it would have held the exclusive cognizance of such cases as in France, under the pre-existing laws of the colony; the form of proceeding, only, would have varied from that which is prescribed by the *Code Civile*.

Upon the principles stated, this will be found to be a very clear case. All tradesmen, by the law of France, were considered to be merchants or rather dealers; and all suits to which merchants and dealers were parties, and in which the cause of action arose in the way of trade, were held in the courts of Paris, to be commercial matters or *affaires de commerce*. The

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ing according to that rule, another contract because it is not between the same parties, (a) and of this the defendant is permitted to take advantage at the trial

Edict of 1563, which created the Consular Jurisdiction of Paris enacts, "Que les juge et consuls des marchands connoitront de tous procès et différens qui seront ci-après mus entre marchands, pour fait de marchandises seulement, privativement à tous Juges Royaux, 5. L. C. Den. 368." And the 4th article of the 12th Tit. of the Ord. of 1673, which in this respect, was merely declaratory of the law of France as it then stood, and had long been practised, as shall hereafter be shewn, and being declaratory is now cited on that account, and on that account only, is in these distinct terms, "Les juge consuls connoitront des différens pour ventes faites par des marchands, artisans et gens de métiers, a fin de revendre ou travailler de leur profession; comme tailleurs d'habits pour étoffes, passemens et autres fournitures; boulangers et patisseries, pour bled et farines; maçons, pour pierre, moëlon et plâtre; charpentiers, menuisiers, charons, tonneliers et tourneurs, pour bois; serruriers, maréchaux, taillandiers, armuriers, pour fer; plombiers et fontainiers, pour plomb, et autres semblables."—5. L. C. Den. 369.—*Le Camus* and the author of the *Jurisprudence Consulaire* are equally explicit. "Sous le nom de marchands,"—says the former,— "on doit comprendre les artisans et les revendeurs, pour ce qui concerne leur commerce." 5. L. C. Den. 449. And the latter says, "Tous ceux qui achètent pour revendre ou pour travailler de leur métier, sont justiciables des consuls. Tous les auteurs s'accordent sur ce point." 5 Juris. Cons. 17.

It has been just now observed that the 4th article of the 12th title of the Ordinance of 1673, was merely declaratory of the law of France as it then stood, and had been long practised, and this will appear upon reference to the arrêt of the 12th of May 1657, pronounced, "en l'audience de la grande chambre," and reported in Ricards' *Recueil d'arrêts* arrêt 2.—2 Bornier 762. In this case the plaintiff was a tanner, and brought his action against two shoemakers, to recover the value of a certain quantity of leather sold to them in the way of trade; and this was held and determined to be a case within the jurisdiction of the *Juges Consuls* of *Châlons* where the sale was made, and not to be within the jurisdiction of the *Prévôté* of *Châlons*, which, as the ordinary court of law, had claimed cognizance of the suit, and was party to the Arrêt. But even admitting that what, before the conquest, by the law of France, was a commercial matter or *affaire de commerce*, was not to be so considered in Canada, because in the peculiar law of Canada there was no such distinction, still as such a distinction is now introduced, the wisdom and experience of France in the designation of her commercial matters by her Edits, Declarations, and Arrêts of the courts of law, are the best and safest guides to the true construction of an Ordinance, by which this distinction has been made by way of exception to the ordinary rules of evidence, which are derived from the law of France. Whether the Ordinance has gone beyond the law of France, or how far it has gone beyond it, we need not at present enquire, as the case does not call for it.

The application of the authorities which have been cited is too clear to

(a) 2 Str. 820. *Leglise v. Champante*, 2 T. R. 282.—*Graham v. Robertson*.

although he has not pleaded that one of the joint contractors is not a party to the suit. (b) The action must be dismissed *quant à présent*.

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Judgment for the defendant.

JONES *against* LAING, AND HEBERT *opposant*.

20th October,
1818.

AN individual of the name of James William James, contracted with Sir William Robinson to supply the garrison of Quebec, with bread for a fixed period, and for the due execution of this contract Messrs. Laing and Hebert became his *caution*, or securities *solidaires*, in a penalty of £1500. James having failed and absconded, Hebert, with the consent of the Commissary General, continued to execute the contract at an expense to himself of £750, and Laing also becoming insolvent his real property was seized by a creditor and sold by the Sheriff, and upon this sale Hebert fyled an opposition *d fin de conserver* for the moiety of the sum

A *fidejusseur* has his action against a co-*fidejusseur* for his proportion of the sum which he has paid for their common principal, but, if there be no convention to the contrary in the deed by which he became security, his action is only for money paid, and consequently, he can have

no mortgage upon the property of the co-*fidejusseur* until he has obtained a judgment, and then, only from the date of that judgment.

require any comment; this is, clearly, a commercial matter which would have been cognizable in the jurisdictions of the *Juges Consuls*, and in the proof of all facts concerning it, we must, therefore, have recourse to the rules of evidence laid down by the laws of England, by which the evidence offered is as plainly admissible. *

(b) 1 Phillips on Ev. 130. * See Pyke's R. p. 11.

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so advanced by him on account of James, and this opposition being contested.

SEWELL, CH. J. The money to be distributed in this case is no other than the proceeds of the real property of Laing, the *cofidejussor*. If Hebert had been subrogated to the rights of the creditor (Robinson,) he might perhaps have supported an action against Laing for his proportion of the sum paid by him for James, and his mortgage might have taken effect from the date of the contract between Robinson, James and his sureties. (a) But as there has been no subrogation, although Hebert has against Laing, for his moiety, an action for money paid and advanced, he has no mortgage security upon the property of Laing for the sum due by him, until a judgment has been obtained. (b) The contestation of Hebert's opposition must therefore be maintained.

(a) 2 Henrys 853. Lepretre Cent. 2. cap. 60. Louet, lettre R. cap. 11
 1 Domat, 256. liv. III. tit. 4. § 4. n. 1. Renusson. Subrogation, cap. 9. No
 17. p. 61. and 2. Argou, 425..

(b) Pothier, Obl. No. 445. Règles de droit par Pooquet, d. l. Livonière.
 Cautions No. 7. p. 379. 2 Henrys, 856. Renusson, Subrogation, cap. 9
 No. 19. p. 61.

Note.—Quoique le cofidejussor ne prenne point cession d'action du créancier, il ne laisse pas d'avoir la même hypothèque que le créancier avait, sur les biens du principal obligé, ce qui se fait par une tacite subrogation.

Basnage Hypothèque, 8°. p. 566. Vide Chapman v. Harrison in appeal, Novr. 1828.

Renusson, Tr. de la Subrogation, p. 59. ch. 9. Nos. 2. 3. and 4.

Renusson states, that the *cofidejussor* who has paid the principal debt, and was 'bound with the principal debtor in one and the same obligation has the action *mandati*, for the recovery of the sum he has paid against the principal debtor, and that the action *mandati* in such case is *hypothecaire*, and that his mortgage dates from the day on which the obligation was executed. He adds that the action *negotiorum gestorum* is a pure personal action. See also 5 Poth. in 4° 420. 8 Rep. de Jur. 632-635. 9 L. C. Den. Hypothèque, § 6. p. 764.

BRUCE *against* **ANDERSON, and RANDALL AND OTHERS**
ASSIGNEES, opposants.

Octr. 20th.
 1818.

ANDERSON, a merchant of Quebec, in desperate circumstances, went to London where a commission of bankruptcy having been sued out, he was regularly declared to be a bankrupt. He then returned to Quebec, and one of his creditors, (*Bruce*) instituted an action against him, obtained judgment and took his property real and personal, in execution. Randall and others, the assignees of his estate, had in the meantime sent out a letter of attorney, and upon the seizure of his property by the Sheriff, an opposition *d fin de conserver*, was filed on their behalf. It was contested, and the parties having been heard upon the issue thereby raised.

SEWELL, CH. J. The general question, which is by this case submitted to our determination, has been left almost entirely to the regulation of those principles and rules of international law which guide the connections between states, and prescribe the sanction and authority which is to be allowed by each, to the institutions and laws of another (*a*) The determinations of the courts of Westminster Hall, have uniformly admitted the title of foreign assignees. (*b*) The same doctrine has been fully established in Scotland and in Ire-

An English commission of bankruptcy operates, in Canada, as a voluntary assignment by the bankrupt. The assignees, therefore, may sue for debts due to the bankrupt, or for his property, and may take the share of the proceeds of the bankrupt's estate which belongs to the English creditors, but such proceedings of the assignees cannot deprive the provincial creditors of any acquired rights or privileges as to the property of the bankrupt, or the proceeds thereof, to which they by the law of Can-

nada, may be entitled, nor can such rights, or privileges be affected by the commission, or by the assignment.

(*a*) Bell's Com. 630.

(*b*) *Ib.*—632. *Sill v. Worswick*, per Lord Loughborough, 1. H. B. 690. *Solo mons v. Ross*, and *Jollet v. Reitveldt*, and *Deponthieu v. Basil*, cited, Bell 631. note c.

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land, (a) and the consequence is, that a commission of bankruptcy in England or in Ireland, and the assignment following upon it, or a sequestration in Scotland and the conveyance in that country to trustees, have at least the effect of transferring to the trustee or assignee, the whole personal estate of the bankrupt, so far as to defeat all undue preferences attempted to be gained in the country where the estate happens to be found, either by action instituted by the creditor or by voluntary conveyance made by the bankrupt after the period at which the effect of the commission of bankruptcy attaches to the funds of the bankrupt. (b)


As to real property and the question how far an English commission of bankruptcy can affect such property out of England, but within other dominions of the crown, it is broadly said by Cullen "that real property seems to be equally within the spirit of the law," "but," he adds, "as to the manner in which the assignees are to come at property of this kind, not only out of the reach of the jurisdiction of the courts of England, *but subject to such positive institutions and local usages as every where govern both the enjoyment and transfer of real property*, (c) I am not aware of any authority. But upon this point it is held in Scotland, that proceedings in foreign bankruptcy,—i. e. in any bankruptcy judicially declared out of Scotland,—will not *ipso jure* operate as a conveyance to assignees, or a divestment of the bankrupt, *so as to bar the preferences by mortgage or otherwise, to which other creditors may*

(a) Bell's Com. 632. text and note (c.) 1. H. Black. 690. 691. Bank of Scotland v. Cuthbert, in 1813.

(b) Bell's Com. 631. 632. n. 2. in text.—Niel, assignee of Gratton v. Coltingham, 1. H. B. 132. Cullen p. 185.

(c) Bell's Comm. 635. Cullen 185.

*be legally entitled upon such real property*, but that such proceedings will enable the assignees to enter into competition with all other creditors who may seek to attach the estate of the bankrupt, and will also enable them to take such further proceedings as may by the local law of Scotland, be required to complete the assignment to themselves. (a) In strict accordance also with these principles, it has been decided in England, that actions by English assignees may be maintained in the plantations for debts due to the bankrupts estate, or for the property of the bankrupt, (b) but as the bankrupt law of England does not extend to the colonies, that the assignment to such assignees has no other than the effect of a voluntary assignment; (c) and of itself does not divest the bankrupt of his property in the colonies, and consequently that it does not affect any right or privilege to which a creditor may be previously entitled, with respect to any portion of the property of the bankrupt, which is found in any of the provinces. It follows necessarily from what has been said, that the opposition of the assignees *d fin de conserver*, upon the proceeds of the estates real and personal, of the defendant Anderson, must be maintained, and they must be collocated according to their rights and privileges, and the respective rights and privileges of the defendant and opposants.

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(a) *Cleve v. Mills*. 1. H. B. 680. *Mawdsley v. Parke*, 1. H. B. 681. 2 *Montague* 508,

(b) 1. H. B. 681. 2 *Montague*. 505. 508. 1. H. B. 680. *Waring v. Wright*, *Richards v. Hodson*, cited in 4. T. R. 197. *Hunter v. Potts*, 4. T. R. 192.

Note.—At the time of the bankruptcy of the defendant Anderson, he had his domicile in Quebec, yet the proceeds of his personal property were on that account to be distributed according to the law of Canada, and as he was insolvent, *en déconfiture*, the distribution was therefore to be *au mare la*

WHITE AND ANOTHER *against* THE SHIP DÆDALUS.

11th Dec.  
1818.

Maritime interest at the rate of 25 per cent upon a bottomry bond given at Quebec not considered exorbitant.

The 6th, Geo. I. c. 18. commonly called the South Sea Bubble Act does not extend to the American Colonies.

**SIR WILLIAM SCOTT.\*** This case arose out of a bottomry bond given and dated at Quebec, in Canada, in November, 1817. The Dædalus being then in that port, destined for London, with a cargo of lumber, and the master not having sufficient means for the purchase of provisions, stores and necessities, borrowed of Messrs. White and Languedoc, merchants of Quebec, the sum of £659, for which he gave the bond in question, on the adventure, with maritime interest for the same, by way of security for repayment, of the sum so advanced, which with such interest amounted to £824., but, in case of loss, no repayment was to take place. The Dædalus reached her port, and the bond becoming due, there remained, after receipts of freight, the sum of £406. 6s. 3d. due to the parties promoting this suit and for which it has been instituted. The interest, £25. per cent, might appear very high; but it is usual in these cases to grant such apparently exorbitant interest; and it is to be remembered that it has been matter of fair

*livre*.—Vide 6. L. C. Den. v. Domicile, sec. 5. n. 5. p. 666. 5. Cochin 85. Lord Loughborough's judgment in *Sill v. Worswick*, 1. H. B. 699. Bell's Com. 632. text and note (f.) *Bruce v. Bruce*, 2. Bos. and Pul. 230.

As to questions arising in the courts of Canada, upon facts, contracts, discharges, &c. which take place between foreigners in their own country, see Bell's Com. 635. *Potter v. Brown*, 5 East 124. 10. Toullier Nos. 74. 79. p. 117. 2 Kent's Com. 350.—8. American Jurist 289.—9. L. C. Denizart, p. 759. col. 2. hypothèque.

(\*) Lord Stowell.

contract and agreement between the parties ; and also, that in case of the vessel being lost the whole sum advanced, it was agreed, should be sacrificed. The contract has been made upon principles of equity which it was incumbent upon the court to maintain with as strong a hand as possible. Now payment had been contested under certain acts, particularly the 6th, Geo. I. c. 18. which is a statute for restraining certain unwarrantable extravagancies, projects and schemes, or as they were called in the language of the times, bubbles, and for protecting owners of ships from exorbitant and fraudulent insurances, &c., and by which it is enacted, that after the establishment of the two corporations which were then about to be erected, only they and no other persons whomsoever should underwrite, insure or lend money upon bottomry after the 20th day of June, 1720. This statute, certainly, went to grant peculiar privileges to those corporations ; and, no doubt, in England had full and entire operation.—It has been held that when two persons, not united in any exterior partnership, united together in bottomry bond, yet in that particular purpose they were partners ; so also in the case of two partners acting separately, in the instance of advancing money on bottomry ; it has been held nevertheless, that here also they were partners in the view of that law, under that law then this payment has been resisted, the money having been so advanced by private merchants, partners in a British American Colony. But it is perfectly clear that such an act could not apply to America. There were no existing circumstances at that time to render it necessary to erect such corporations in that part of the

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world as were meant to be recognized by this statute. To prove that the intention was to limit its provisions to this country a later act has been since passed, in the reign of George II. to extend its operation to His Majesty's British Colonies. But this latter act, as is evident from the preamble, regarded only those extravagant bubbles and speculations before alluded to. It is not alleged in either of them that the two corporations, so created, had any agents in America, and what business could they have there? They were neither wounded or damnified by the operation of the law in any way : if then, its policy did not extend to America, so neither did its prohibitions. But little necessity could possibly exist for the creation of two such bodies as those to which in England the privilege of lending upon bottomry bond had been secured. Moreover, it was very obvious that no evil could result in this country from this exclusion of individuals : but what remedy, were the same policy observed in Quebec, could a master of a vessel find thus distressed for means? Capital is surely infinitely more scarce in our colonies than in Great Britain ; on the whole, therefore, the court is of opinion that the act (a) does not extend to America, and that the parties having advanced monies on account of the ship with *bonâ fide* intentions and on a fair understanding are entitled to recover. I therefore pronounce Judgment for the claim as stated.

(a) As to the various adventures intended to be suppressed by this statute, see Anderson's History of Commerce.

BORNE *against* WILSON AND OTHERS,  
*Churchwardens of the Roman Catholic Parish Church of*  
*Quebec, and against* BÉLANGER.

20th Feby.  
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THE churchwardens (*marguilliers*) of the Roman Catholic Parish Church of Quebec, conceded a pew in the year 1771, to George Borne, the plaintiff's father, who died in 1814, leaving no other issue than the plaintiff. During his life the pew in question was occupied by George Borne, and after his decease by his widow, until the year 1817, in which year, she having married again, and having quitted the parish of Quebec, the pew, by order of the defendants, the churchwardens, was put up at auction and adjudged to Bélanger the other defendant at an advanced rent, upon which the plaintiff demanded the pew of the churchwardens upon the ground of his being the only son of George Borne and willing to pay the rent at which it had been adjudged to Bélanger, and the *marguilliers* having refused his application, this action was brought to evict Bélanger, and to compel the churchwardens to allow the plaintiff to use and occupy the pew at the advanced rent.

The eldest son of the *concessionnaire* of a pew is entitled to have it, upon the re-marriage of his father's widow, at the price at which it may then be adjudged to the highest bidder.

*Per curiam.* As to the form in which this action has been brought, it has been instituted against the defendant who is found in the occupation of the pew, under title from the churchwardens ; and the churchwardens having been made parties to the suit have thereby been enabled to justify the title they have given to the present occupant Bélanger, and to shew



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 v.  
 WILSON.

that it excludes the plaintiff from the privileged preference which he claims over Bélanger the "*adjudicataire*" of the pew. This is certainly a fair proceeding and as it has been supported by the precedent, which has been cited from the edicts and ordinances, (a) we see no reason to impeach it.

As to the merits of the action, the churchwardens were undoubtedly right when they put up the pew to auction, upon the second marriage of the widow of George Borne the father of the plaintiff, the reglement of the 9th June 1723, under the royal signature, having enacted generally, "*Que les veuves, qui resteront en viduité, jouiront des bancs concédés à leurs maris, en payant la même rente portée par la concession qui leur en aura été faite.*" (b) But, under the same reglement, the plaintiff in consequence of his mother's second marriage, has now a privileged claim of right, to the pew conceded to the father, provided he is willing to take it at the price at which it was adjudged to the present occupant Bélanger, and this he is willing to do. His action therefore must be maintained, no efficient cause to the contrary being shewn either by the churchwardens or by Bélanger. (c)

Judgment for the plaintiff.\*

(a) Vol. 2. p. 303.

(b) 1. Edits et Ordon. 434.

(c) 1. Edits et Ordon. 434, vol. 2. p. 303. Gouvernement des paroisses, 59.

\* Affirmed in Appeal on the 19th January, 1822.

AUGER *against* GINGRAS.13th April,  
1819.

*Complainte*  
cannot be  
maintained for  
a disturbance  
by entering a  
pew in a  
church, by  
one parishion-  
er against ano-  
ther.

**A** DEMURRER by *défense au fonds en droit*, to an action of *complainte* against a parishioner of a Roman Catholic parish church by another parishioner for entering upon and disturbing the latter in the possession and enjoyment of his pew, having been pleaded and the parties heard ;—

*Per curiam.* *Complainte* is founded in possession, and therefore will not lie for a disturbance by entering a pew, because the possession of a pew does not vest in a parishioner but in the *curé*, and *marguilliers*, in whom the possession of the whole church resides. (a) An action in *factum*, therefore, is the proper remedy by one parishioner against another for a disturbance of this description (b) and an action *d'injure*, if the cause of complaint amounts to a *voie de fait*. (c) It must however be observed, that in any action founded upon a disturbance *en droit* by intrusion into a pew, the plaintiff must allege title to the pew (from which he claims the right of excluding others) derived from a concession (or faculty as it is termed in the canon law) or from some other source, if there be any other which he may claim. A quasi possession “ qui

(a) 4. Pothier Possession, No. 37. p. 535. *Stocks v. Booth*, 1. T. R. 428. 1. Burn's Ecclesiastical Law, 343. 344. 1. Diet. Can. 431. 432. 17. Rep. 605. Droits Honor. Marechal, cap. 3. et 4. 3. Mem. du Clergé, 1408. 1433. et 1602. 2. Arrêts cited in 2d. Rep. de Jur. 121. v. Banc.

(b) *Stocks v. Booth*, 1. T. R. 428.

(c) 17. Rep. de Jur. 229. and 605.

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ne consiste que dans des droits," is the utmost that any parishioner can even pretend to have in a pew, and to every action which is founded upon a quasi possession of this character, title is essential and must therefore be alleged and proved. (a) Now the declaration is in this respect entirely defective. There is not an allegation of any kind as to title of any description in any part of it. It fails, therefore, as well in the libel as in the conclusions which are those of the action *en complainte* simply. For these reasons the demurrer must be maintained,—and the action dismissed quant à présent.

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GAUVIN against CARON.

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20th April,  
1819.

No action *en revendication*, can be maintained by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possession by virtue of an *envoi en possession*, or a final *délivrance* of the estate and succession.

THIS was an action by the heir of a person who had left the province several years before it was instituted and was supposed to be dead.

*Per curiam.* This action cannot be maintained. The property moveable and immoveable of an absen-

(a) *Stocks v. Booth*, 1. T. R. 428. 5. L. C. Den. *complainte*, sec. II. No. 3. 9. 10. 11. and 12. and vol. 3. p. 179. *Bancs dans les Eglises*, sec. 6. n. 2. Pothier *Possession*, Nos. 90. 91. 92. *Règlement* of 9th June, 1723. 1. Ed. et Ordon. 434.

Serpillon C. C. 282. 283. art. V. note 2. Domat liv. III. tit. 7. sec. 1. n. 5. p. 260.—Poth. *Possession*, Nos. 90. 91. L. C. Den. *complainte*, sec. 2. Nos. 9. and 10. Vide *Wexler v. Wilson*, B. R. Q. 1820. No. 810.

tee who has left the country without appointing any agent or attorney to take charge of it is, from the date of his departure, in the care and custody of the King's courts, and in such case they will in the first instance appoint a curator. (a) At the expiration of ten years,—calculated according to circumstances from the date of his departure or from the date of the last intelligence respecting him,—they will put the presumptive heirs into possession by an *envoi en possession*, (b) and after a lapse of thirty years,—or sooner upon due proof of the death of the absentee, *intestate*,—they will finally invest the heirs at law with the possession of the estate and succession of the absentee *en pleine propriété*. (c) The plaintiff in this action is not entitled to the possession of the property which he demands either as curator to the estate of the absentee or by an *envoi en possession*, or by a final *délivrance* of the estate and succession,\* and he produces no evidence, not even a single presumptive proof of the death of the absentee. (d) He cannot under such circumstances recover in this action.

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GAUVIN  
v.  
CARON.

Action dismissed quant à présent.

(a) *Règlemens sur les Scellés*, lib. 1. c. 17.

*Questions de Bretonnier*, vol. 1. p. 12.

(b) *Ib.* p. 12-14.

(c) *Ib.* p. 18.

(d) 6. Poth. 123. 4. 7. L. C. Den. 716, No. 1. and 717, Nos. 6. and 7.—  
2. Pig. p. 3. 1. Rep. de Jur. 67. Lebrun Successions, p. 2. § 1. Charou-  
das Responses, lib. 7. R. 106 and 107.

An *envoi en possession* is not inheritance by succession, it is a species of sequestration which entitles the heirs to the possession and to the administration only of the estate of their ancestor. They obtain this possession because they are apparently better entitled to it than strangers, but they do not acquire any right of property in what they possess, they cannot sell or mortgage, and they give security to account and refund if their ancestor should return, 1. Rep. 68. 3. Pandectes Françaises, 16. See also 1. Bretonnier, Quest. de dr. p. 11.

CAMPBELL *against* SHEPHERD AND CHARTIER *opposant*.19th June,  
1819.

Le mort saisit le vif. A common legacy therefore, vests in the heir at law, and he is not divested of the same until a *délivrance de legs* has been obtained.

ON an adjudication by décret of a house and lot of land belonging to the defendant, an opposition *à fin de conserver* was fyled by the heirs of one Dubord, a priest, claiming the capital of a *rente constituée*, secured by mortgage thereon. It appeared at the hearing that one Judith Chartier was, by the will of Dubord, entitled to the *rente* during her life, and for this was an opposant, that the capital of the *rente* had been bequeathed by the same will to the Roman Catholic Bishop of Quebec, for the foundation and support of a school, for the education of the testator's relations, and their descendants for ever.\* But no opposition was fyled by the Bishop.

*Per curiam.* We cannot, certainly, award the capital of this *rente* to Judith Chartier, for she has no claim to it, nor to the Roman Catholic Bishop of Quebec, for he is not in the cause. Then, as to the claim set up by the heirs of Dubord, to the capital of the *rente*; The death of Dubord has cast his succession upon his heirs (*le mort saisit le vif*) and consequently, to the *saisine* the heirs are entitled. But on the other hand Judith Chartier is entitled to the *rente* of this capital during the term of her natural life. Upon the whole

5. Rep. de Jur. 370. 1 De la Jannès, 87. 65-67. 2 Lebrun, p. 6. Duplessis Paris, art. 318. Poth. Orleans, art. 336. Domat, Liv. 1. tit. 3. § 6. L. C. Den. 161. and 164-167. Journ. des Aud. vol. 6. arrêt 16 Mars 1677. 5. Poth. 337. 9. Pandectes Françaises, 123. Nos. 343. 344. 345. 5 Toullier, 530. Nos. 572. 573.

therefore, although the heirs must receive the capital of the *rente*, we cannot award it to them without requiring security for the legal execution of the will, as respects Judith Chartier.

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 ~~~~~  
 CAMPBELL
 v.
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 CHARTIER.

Judgment accordingly. *

RIVERS *against* DUNCAN.

THIS was an action of damages for the non-delivery of goods received by the defendant, a master of a ship, on freight for the plaintiff. Upon the trial it appeared that four bales of woollens had been shipped, addressed to the plaintiff, and were brought in good condition to Quebec, that the defendant repeatedly gave notice to the plaintiff of the goods being on board, and requested him to remove his bales, as they were lying on the upper part of the cargo. That in the first instance, the plaintiff said he had no advice of the bales, but afterwards promised, more than once, to take them

19th Octr.
 1819.
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Merchandize imported from abroad is delivered to the consignee when placed on the wharf, and is from thence at his risk, provided notice of the arrival of his goods has been given to him.

\* Affirmed in appeal in April term 1820. Upon the legacy in this case to the Roman Catholic Bishop to found and support a school, see the case of the *Attorney General v. Hutchinson*, Dicken's Rep. 518. in which "a legacy to build a school house and to endow it, the parish having land on which a school house formerly stood, was held to be within the statute of mortmain." The Bishop made no claim to the capital, and (as was alleged by the Counsel for the Respondents, the heirs Dubord, in his case in appeal,) thereby admitted, that the bequest having been made to him in his corporate capacity, without the previous permission and sanction of the Crown was null as a gift in mortmain, and this was the opinion of the court of King's Bench.

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 v.  
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away. He did not however do so, and after some days the defendant put them on the wharf, ~~were~~ they were seized for non-payment of the duties.

*Per curiam.* In the case of ships coming from a foreign port to the port of London, delivery at a wharf discharges the master, (a) and upon the evidence adduced in this court, in the case of *Patterson v. Davidson*, (b) this was held to be the rule of the port of Quebec, if the consignee had notice of the arrival of his goods. In the case before us, Rivers, the consignee, was bound to look after his bales of woollens from the moment he was informed of their arrival, and he was repeatedly required to take them away. The omission to enter them at the Custom house, which it was his duty to do, was gross negligence,—*crassa negligentia*,—on his part. The goods, after a considerable lapse of time, were delivered on the wharf as is customary, and if the steps which were necessary to protect them against seizure for the non-payment of the King's duties, were not taken by Rivers, the laches are his own, and he must necessarily abide by the consequences. For these reasons we fully concur with the jury in the verdict \* which they have found for the defendant, and reject the motion which has been made by the plaintiff for a new trial.

### Judgment for the defendant.

(a) Abbot on shipping 261.

(b) In this case, which was decided on the 19th day of April 1810, it was held that goods brought on freight, to be paid at Quebec, on delivery, cannot be removed from the wharf before the freight is paid, and if in good order, they are delivered when placed on the wharf.

\* In this case it was held, that if a party moved for a jury, he cannot afterwards reject the verdict, on the ground that the jury ought not to have been allowed, because he, the mover was not a merchant or a trader. It was said *Per curiam* :—This motion is an acknowledgement that his quality is within the meaning of the Ordinance 25. Geo. III. c. 2. § 9.

## LARUE v. CRAWFORD AND OTHERS.

20th Octr.  
1819.

**PER CURIAM.**—Where a commissioner notoriously acts as an agent for government, his office excludes the presumption of credit being given to him personally, and he is not liable for the contract into which he enters in his public capacity, although there be no other person against whom an action lies to enforce the contract, which he has entered into. (a) But if he has received the money from government, which is to be paid to the person with whom he contracted, an action for money had and received, may be maintained. (b) In this case it appears that the defendants have received the money which Larue, who contracted with them for erecting the gaol at Gaspé, is to receive for the building he has erected, and no sufficient reasons have been offered to induce us to believe that it has not been fairly earned,

A contractor for a public building can maintain an action against the commissioners with whom he contracted for the erection of such building if they have received from government the money which is due to them.

## Judgment for the Plaintiff.

(a) *McBeath v. Haldimand*, 1. T. R. 172. 5. *Cochin*, 756. 760. *Paley Prin. and agent*, 296 1. *Comyn on contracts* 272.

(b) *Rice v. Everitt*, 1. East R. 583. in notis. 1. East 135 and 579. *Paley Pr. and agent* 297. see also 1. T. R. 674.

See the cases of *Vondenvelden v. Sewell*, Attorney General, in K. B. Q. about the year 1799. *Scott v. Lindsay* ante p. 68.—*Goodenough v. D'Estimauville*, K. B. Q. 1817. No. 425. *Hebert v. Vallé*, Ib. No. 525. *Landry v. Baillargé*, Ib. in 1819. No. 501.



GOUDIE *against* LANGLOIS.

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20th October.  
1819.

An action of trespass, *d'injure*,—cannot be maintained against an officer who executes a writ issued upon a judgment rendered by an inferior court in a matter over which they had jurisdiction.

**BY** the Provincial Statute 45. George III. c. 12. § 2. The Trinity house of Quebec, is authorized and empowered, *inter alia*, to make bye-laws “in respect to “the boiling or melting of pitch, tar, turpentine, or “rosin, in the harbours or on the beaches of Quebec “and Montreal, or *Cul-de-Sac* of Quebec.” Goudie, the plaintiff in this action, boiled pitch, within the limits of the harbour of Quebec, contrary to the provisions of a bye-law of the Trinity house, of the 10th of June 1818, enacted under the authority before stated; and having been summoned to answer for the offence upon an information fyled by Lambly, before the master and wardens of the Trinity house, and, after hearing, being convicted, a judgment for the penalty which the bye-law inflicted was rendered, and an execution against his goods and chattels was issued, addressed as usual to the water bailiff, of the Trinity house, who levied the amount:—The present action was thereupon instituted for the recovery of damages against Langlois for an alleged trespass in taking and selling the property of Goudie, and the defence was a plea of justification founded upon the facts which have also been before stated.

*Per curiam.* The master and wardens of the Trinity house undoubtedly had jurisdiction over the subject matter of the information which was fyled, and therefore, as they are not responsible to the plaintiff for

their proceedings, even if their judgment be erroneous (a) their officer who has legally executed a judgment, legal in itself, though erroneous, must necessarily be free from all responsibility on his part. In fact, in all such cases as the present in which damages are sought to be obtained from the officer who executes the writ, the want of jurisdiction in the court from which it issued, must be apparent upon the face of the writ itself, and unless it be so the officer cannot be considered as as a trespasser. (b)

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 GOUDIR  
 v.  
 LANGLOIS.


Judgment for the defendant.

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PACQUET *against* GASPARD.

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20th April,  
 1820.

  
 An alien domiciled in Canada but not naturalized is incapable of taking real property by devise.

**T**HIS was an action, by the heir at law, against the possessor of a lot of land and dwelling house as part of his ancestor's estate to which was pleaded, a devise thereof by will to the defendant, and a special answer admitting the will, but averring the defendant

(a) 10 Coke 71. Hammond's N. P. 45.

(b) Buller's N. P. 82. Hawkin's P. C. lib. 2. cap. 13. § 10. 3 Leach's Ed. 175.

See a case in Burr. R. 1763. and Boucher's case in Cro. Jac. 81.

As to the liability of the officer where the inferior court has no jurisdiction, and of the plaintiff where the court has jurisdiction, See 2 Wilson's Rep. 384.

Held in the United States, that an imprisonment under a judgment of court is not unlawful, if the court had general jurisdiction of the subject, although the judgment be erroneous. *Ex parte Tobias Watkins*, 3 Peters Rep. 201. cited in the American Jurist vol. 4. p. 360.

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 ~~~~~  
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to be an alien born in France and incapable of taking real estate. To this special answer the defendant replied by a peremptory exception (a) in which he admitted that he was born in France, but of British parents, in a British ship, driven into the harbour of Dunkirk and was therefore a British subject; upon which averments issue was taken by a General Replication, and after a hearing on the merits,

Per curiam. There is no proof of the defendant's exception, and he admits that he was born in France. In the will he is stated to be "*natif de France.*" By the depositions of Tétu and Vallières it is in evidence that he has uniformly stated himself to be a subject of France; and of his birth from British parents,—as pleaded,—there is no proof whatever. That he is an alien, therefore, cannot be doubted, and being,—as such,—incapable of taking real estate by devise (b) the Judgment must be for the plaintiff.

(a) See Ante, p. 107.

(b) 5. Poth. 576. Domat Lib. 1. tit. 1. sec. 2. n. 9. vol. 1. p. 354. col. 1. and p. 365. col. 1. n. 3. p. 430. col. 1. n. 12. Ib. Dr. pub. tit. 6. § 4. No. 5. p. 47. 48. 2. L. C. Den. 580. Bacquet Dr. d'aubaine. part 3. cap. 18. Nos. 1. 2. 3. Loyseau Seigneuries, cap. 12, p. 73. 2. Despeisses, p. 448. 449. Rep. de Jur. Aubaine, 722. col. 1. Loysel Reg. 50. 51. 52. Lacombe Aubaine, sec. 2. 2. Febyro de la Planche, 125.

HOGAN v. WILSON.

9th October,
1820.

THE plaintiff demanded of the defendant a sum lent in London in the year 1795.

Per curiam. The debt in this case was contracted in England without any reference, direct or indirect, to the law of any other country. The law of England therefore (*a*) is the standard of decision and the statute of limitations must of course apply.

The statute of limitations is a good plea to a debt contracted in London without reference, direct or indirect, to the law of another country.

Action dismissed.*

(*a*) Robinson v. Bland, 2. Burr. 1077. 1. Black, 234. 256. 1. Williams, Dig. 273.

* Præterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda, aliud juris apud nos, aliud esset ubi contractus erat initus, utrius loci jus servandum foret? Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit prescriptionem apud nos in ejusmodi debitus receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi præscriptionem non esse receptam; proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa *Justi Blenkenfeldt* contra G. Y. iterum inter *Johannem Jonoliin*, Sartorem Principis Arausionensis, contra N. B. *utraque ante magnas ferias* 1680. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causæ cognitione et sententia. Ratio hæc est, quod præscriptio et executio non pertinent ad valorem contractus, sed ad tempus & modum actionis instituendæ, quæ per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius lib. 1. tit. 12. def. 5. ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci, in quo fit executio, non ubi res judicata est. Huberus. — De conflictu legum. Lib. 1. tit. 3. § 7.

A statute of limitations in a foreign country where the contract is made, has been held to be no bar in a suit brought on the contract in New York. Nash v. Tupper. 1. Caines, 402. Ruggles v. Keeler, 3. Johns. Rep. 263 The *lex loci* is held to apply only to the validity or interpretation of the contract, and not to the time, mode or extent of the remedy.

THE SEMINARY OF QUEBEC *against* PATTERSON.

18th October,
1820.

On proof of 30 years possession, the party is not bound to produce a title or to offer any evidence to shew that he held *animo domini* or *de bonne foi* until the contrary is proved by the plaintiff.

THIS was an action of Revendication brought by the Seminary against Patterson to recover a piece of land which had,—as it was supposed,—been granted by the *Seigneur* of the Fief of Beauport. The Seminary averred that it was within their *Seigneurie*. In answer, however, to the action, the defendant did not set up a title by concession from the Seminary, or from the Seignior of Beauport, but pleaded thirty years possession, and rested his defence entirely upon this exception.

Per curiam. The defendant, Patterson, has distinctly proved a public and uninterrupted possession of the land in question by himself and by his predecessors, for a *period exceeding* thirty years ; and upon such evidence in all cases of this kind, the law, from the length of time elapsed, presumes that the defendant has possessed “*animo domini*” and “*de bonne foi*” unless the contrary is proved *by the plaintiff*, and does not require the defendant to offer proof on either of these points, or to produce a title of any description. The Seminary have not attempted to prove in this case, that Patterson has held the land under any circumstances which might shew that his possession was not “*animo domini*,” or was “*de mauvaise foi*,” and the action must therefore be dismissed. (a)

(a) Grainville's Arrêts.—Arrêt of 21st July, 1731, p. 385. This decision was affirmed in appeal on the 20th January, 1823.

SCOTT *against* THE QUEBEC FIRE ASSURANCE COMPANY.20th October,
1821.

Policies of Insurance are to be construed by the same rules as other instruments; therefore, where there is an express warranty there is no room for implication of any kind.

ON the 21st day of August 1820. the plaintiff insured the sum of £2600. at the office of the Quebec Fire Assurance Company, upon a house which he inhabited in Montreal, and upon the goods and merchandize, furniture, plate, &c. which it contained, all of which were consumed by the fire on the 15th day of August, 1821. while the policy was in full force. It was proved that the fire began in an adjoining house, and spread from thence to a wooden building on the premises of the plaintiff, from which it was communicated through a doorway of the dwelling house, *which was open, although it had an iron door*, to the interior of the last mentioned edifice, and that it broke out between eight and nine o'clock in the evening. In the Policy of Insurance it was stated "that the dwelling house of the assured was built of stone and covered with tin, gables through the roof and plafond, iron doors and shutters," and for the defendants it was contended, that these words "iron shutters and doors" amounted in law to a warranty, which according to the facts above stated had not been performed.

SEWELL, CH. J. The rule as to contracts in general is, to give language its true effect according to the intention of the speaker or writer, as inferred from the whole expressions and the nature of the occasion to

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SCOTT

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PANY.

which they are applied. (a) And policies of insurance are to be construed by the same rules as other instruments, unless where by the known usage of trade, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. (b) In this case the description of the premises which was furnished by the insured is inserted in the policy, and if in point of fact it be true, as it undoubtedly is, that they were "built of stone and covered with tin, had gables through the roof and plafond, iron doors and shutters," whether we consider these expressions in the policy as a "*representation*," or as a "*warranty*," is immaterial. For, in either instance, the express contract of the assured has been "*substantially*" and "*strictly*" performed, (c) and being an express contract, there is no room for implication, *expressum facit cessare tacitum*. The doors and windows being open in the middle of August, at half-past eight o'clock, is no proof of negligence.

Judgment for the plaintiff.

(a) 1. Ev. Poth. 59 in notis.

(b) Robertson v. French, 4. East Rep. 130.

(c) 3. Selw. N. P. 881.

Note.—A warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words. Thus :—There was a warranty that a ship should have 20 guns ; and it appeared that she had, in truth, 22 guns, but only 25 men ; which number is far short of the necessary complement for 20 guns. It was objected, that this warranty implied a competent number of men to work 20 guns, in case the ship should be attacked.—But it was determined that the warranty did not include any thing not necessarily implied in it. Lord MANSFIELD said,—“ If a warranty “ be meant to mislead, it is a fraud, as much as a false representation. In “ this case there is no ground to impute fraud, and therefore the plaintiff is “ entitled to recover.” *Hyde v. Brucc*, B. R. Hil. 23. G. III. M. S. cited in Marshall on Insurance, p. 347. and in Phillips on Insurance, p. 128.

ON APPEAL FROM QUEBEC.

THE REVEREND GEORGE SPRATT, *Appellant*,
and
OUR SOVEREIGN LORD THE KING, *Respondent*.

20th January.
1821.

THIS was a case depending upon the interpretation to be given to the provincial act 35, Geo. III. cap. 4. which establishes the form of registers of baptisms, marriages and burials. *

RICHARDSON, *Executive Councillor*. It neither was or could be the intention of the Legislature, by this Statute, in employing the words "Protestant Churches or congregations," to throw open the door respecting the keeping of such registers indiscriminately to all Protestant Sectaries hereafter without restriction. In such case the evil would have become greater than that meant to be remedied. At the time when this statute was passed, there were no other protestant churches or congregations in this province, than those in communion with the churches of England and Scotland; and therefore, the interpretation of the act that such only were intended by it, is corroborated. This question has no relation to the exercise of religious worship without restraint. This court neither can, nor does it mean to touch or affect full religious toleration. The present case respects a civil office of great importance

The words "Protestant Churches or Congregations," used in the statute 35. Geo. III. c. 4. which requires Rectors of parishes, &c. from 1st January, 1796. to keep two registers, both of which to be authentic, held to embrace only such churches and congregations as had their existence in the province when the statute was passed.

* Vide this case in B. R. Q. reported ante p. 90.

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to the temporal and civil rights of His Majesty's subjects, in regard to the proofs to be adduced of legitimacy, when the transmission of property may become a matter of legal contest; such an office, as keeper of such a register, cannot be claimable by any person as of right, unless the act conferred that right. This court does not consider it to be so conferred. The decision has no reference to the education and moral character of the appellant, which are understood to be most respectable. It is confined to the interpretation of the law, without reference to persons. Neither does the court mean to say that the keeping of such registers is incapable of being extended under proper safeguards against abuse. That must depend upon the wisdom of the Legislature, * and if our interpretation be erroneous, it is for the supreme court of appeals to correct the decision.

The judgment of the court below is affirmed, and this appeal dismissed, but without costs.

* Since the decision in this case the following Statutes have been passed, viz :—

An act to extend privileges therein mentioned, to the religious classes of persons denominating themselves Wesleyan Methodists, 9 and 10, Geo. IV. cap. 76.

An act to extend certain privileges, therein mentioned, to persons professing the Jewish Religion, and for the obviating certain inconveniences to which others of His Majesty's subjects might otherwise be exposed, 9 and 10, Geo. IV. cap. 75.

An act to afford relief to a certain religious congregation at Montreal denominated Presbyterians, 1 Will. IV. cap. 56.

An act to enable the regularly ordained ministers of the United Associate Synod of the Secession church of Scotland to keep authenticated registers according to law, 3 Will. IV. cap. 27.

An act to afford relief to a certain religious congregation at Montreal, denominated Baptists, 3 Will. IV. cap. 29.

LATOUCHE *against* ROLLMAN.17th April.
1822.

THIS action was for money laid out and expended. The plaintiff and defendant were joint proprietors of a *mur mitoyen*, party wall, between their respective dwelling houses in the city of Quebec, which required repair. It did not appear in evidence that the plaintiff had taken the usual steps of establishing by *experts*, the necessity of the repairs which he proposed to make, and which in fact were necessary; nor was it in evidence that the defendant had at any time objected to their being made. It was proved on the other hand, that the defendant had knowledge of the plaintiff's intention to repair before the work was commenced. That he daily saw the work during its progress without comment or prohibition, and after it was finished refused on demand, to pay a moiety of the expense which had been incurred, but no express promise, on the part of the defendant, to pay the amount of this moiety was proved.

Per curiam. A contract of mandate may be implied from the conduct and acts of the parties without any express declaration of their mutual intentions, and therefore, according to Mr. Pothier's opinion "when with the knowledge, and in the sight of another man, I perform for him any work and labor which he is bound to perform, the law raises on his part the *obligatio mandati contraria*," by which after the work is finished, he may be compelled to refund to me the sum of money which

An action for money paid and advanced, may be maintained by a proprietor of a *mur mitoyen* against his co-proprietor for his proportion of the sum expended in the repairs of the wall, if the latter has impliedly acquiesced in the making of such repairs.

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in the prosecution of the work, I have disbursed and paid for him. (a) The present action is simply for money paid and advanced, and we see nothing to prevent the plaintiff from obtaining judgment, for although an *expertise* to establish the necessity of the proposed repairs is the usual course of proceeding in such cases as the present, it is necessary only, in those instances in which the party defendant demands an *expertise*, or is either ignorant, or adverse to any repair. (b)

Judgment for the plaintiff.

ON APPEAL FROM MONTREAL.

JOHN SCOTT AND OTHERS, *Appellants*,
 and
 THE PHOENIX ASSURANCE COMPANY, *Respondents*.

20th January,
 1823.

Under the clause or condition in policies of insurance, that in case of any dispute between the parties it shall be referred to arbitration, the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference in the progress of the suit.

THIS appeal arose out of an interlocutory order of the Court of King's Bench at Montreal in an action of covenant upon a Policy of Insurance by which that court assumed the power of compelling the parties to

(a) 2 Poth. Mandat No. 29. p. 856. No. 180. 1b. p. 923. No. 5. also p. 844. 2 Bourjon, p. 13. No. 10.

(b) 1b. No. 9. 2 Poth. Société 1er Append. No. 220. p. 615. Peck v. Wood 5. T. R. 130-133.

submit the matters in contest between them to arbitration, thereby enforcing the specific execution of a clause or condition in the policy of *insurance* in the following terms:—"In case any difference or dispute shall arise between the assured and the company, touching any loss or damage, such difference may be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding to all parties."

Buchanan for the appellants.

In three distinct points of view it would appear that the court below had acted unwarrantably in referring the matters in issue between the parties to arbitrators. 1. That considering the terms in which the condition was couched, it appeared, evidently, to have been the intention of the parties that the submission to arbitration should be dependent on the free will of the parties, but if the parties did submit, that the award to be made should be obligatory. 2. That even a submission to arbitration is a revocable instrument and is assimilated to a power of attorney; (a) *a fortiori*, an agreement to submit cannot bind irrevocably. And a party refusing *stare compromisso* could be made liable only to a penalty agreed upon, or to assessed damages. In accordance with which is the principle of the French law declaring that the courts cannot decree a specific performance, *nemo potest cogi præcisè ad factum*. (b) 3. That the King cannot, by an agreement between any two

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(a) Vignior's case, 8. Co. Rep. 163.

(b) Pothier Obl. No. 157.

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or more of his subjects, be divested of his prerogative of judicial supremacy the exercise of which he has delegated to his courts of justice. That those courts have accordingly always held that a mere agreement of persons to submit matters in dispute between them to arbitration cannot oust the courts of their jurisdiction, nor deprive the contracting parties of their right of resorting to the royal tribunals for the adjustment of their controversies. (a) A doctrine favored by this court in *Pasteur* and *Mezieres*, (b) and by the Court of King's Bench at Quebec in *Racey v. McCallum*. (c)

*Fletcher*, on the same side, referred to the Roman law as amended by *Justinian*. By the common law no man in England is bound to submit to any tribunal but the King's courts; and consequently, a legislative provision was thought necessary to enable the courts to enforce a submission to arbitrators under a rule of reference, stat. 10. and 11. Will. III. and this statute has been construed strictly. (d)

*T. Gagy*, for the respondents, contended, 1. That the Laws of Canada must be resorted to in this case. That there is no similitude between the covenant in question and a power of attorney. The maxim *nemo potest cogi præcisè ad factum* is misapplied, for *Pothier* (e) restricts it to cases in which the personal act of the covenantor is stipulated. As to the clause being in the potential mood, the court was not to be consi-

(a) 2. Marshal on Insur. H. 679. Kill v. Hollister, L. Wils. 129. Thompson v. Charnock, 8. T. R.

(b) Determined July. 1818.

(c) Determined in February, 1819.

(d) Jenkins v. Law, 8. T. R. 87.

(e) Contrat de Vente, No. 479.

dered a board of philologists, and was bound to give effect to the clause. In legal parlance the words *might* and *may* were equivalent to *shall*. The covenant is not contrary to the law of Canada. The contract of insurance is peculiarly inviolable, and the clause which it contains is not repugnant to the law of Canada before the conquest. (a) It was an ordinary clause in that contract, and one always enforced by the courts in France. (b) The powers and jurisdiction of the Court of King's Bench were established by the statute 34th, Geo. III. § 8. and include those of the superior council which were regulated by *edits et ordonnances*. 2. That the office of arbitrators in this case was like that of *experts*. (c) The court therefore, was not despoiled of their cognizance of the cause having still power to annul the award. An essential difference existed between this case and those cited by the counsel for the appellants. In *Thompson v. Charnock*, the question there to be referred was the construction of a charter party. The same in 4. *Brown*. As to *Kill* and *Hollister*, it was not applicable, no plea having been made setting forth the covenant.

*A. Stuart, pro iisdem.* The appellant's counsel had argued as if the court had divested itself of jurisdiction, such was not the case. If the defendant had asked the court to dismiss the action, the English cases might have been applicable. The arbitrators derive all their authority from the court, and the con-

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(a) 3. Pothier.—Assurance, No. 197.

(b) Ordon. de la Marine. 2. Valin 44. 5. art. 70. p. 154. Conference de l'Ord. de la Marine, &c. p. 251.

(c) Nouv. Den. v. Arbitrage, 239.

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trol of the court is evident through the whole course of proceeding. *May* is considered equivalent to *shall*, as "shall or may be lawful" in acts of parliament, otherwise the clause would be nugatory. Besides, all agreements must be compulsory. Submission to awards have always been favored by the legislature in France and in England, and it is difficult to account for the pertinacity of the courts in opposing the designs of the legislators. This case is not governed by the law of England, but conceding the contrary, in all the cases in England the question arose upon the covenant being pleaded in bar of the action. As respects the law on the subject in France the ordinance *de la marine* is only declaratory of the common law before that period. (a) In the French courts the judges had fees, and consequently legislative interference was necessary to compel them to send parties to arbitration. But here as the court receive no fees, they can have no interest in preventing references.

(SEWELL, CH. J. When a party refuses to name an arbitrator, whence have the courts derived a power to nominate instead of the party refusing?)

The rule *nemo potest cogi præcisè ad factum* cannot be applied. In England no specific performance of a contract of sale can be decreed, but the chancery can say that their judgment shall be equivalent, so here an engagement to refer to arbitrations. No man can set up his own wrong. Covenant to submit implies every thing accessory and necessary to accom-

(a) 1. Pigeau, 246. 1. Jousse Ord. of 1667. tit. 14. art. 7. Rep. de Jur. r. Arbitrage. 553, No. 3. Poth. Proc. Civ. ch. 4. p. 2. art. 2. Dict. de Royer, art. Arbitrage forcé, p. 168. 170. 2. Valin. Ord. de la Marine 154.

plish the intentions of the party. A man asking relief will have relief according to his covenant. But the contract of assurance stands singular, and is not like contracts *juris gentium* but entirely arising out of municipal, arbitrary, and positive law, and the agreement of the parties. In such a contract a deviation in one particular destroys the whole. Contracts *juris gentium* are carried into effect *per æquipollens*, in assurance no such execution is used and specific performance must be had.

*Fletcher* heard in reply.

SEWELL, CH. J. The laws of England and of France correspond on the question. The court is of opinion that there has been an assumption of authority by the court below. Courts of Justice in deciding questions must derive their authority from the law or from the consent of the parties. In this case there is no such derivation of authority to the court below, and on that principle their judgment is reversed. The word *may* is distinct from *shall*, the one imperative and the other permissive. Words of common parlance are not to be construed as legal phraseology. The courts in such case interpret language as any common person would do with relation to legal acceptance. No specific performance of a contract can be compelled. (a) How could a court of equitable jurisdiction have compelled specific performance? It proceeds by imprisonment to compel performance. (b) The court did not so proceed in this case. It did not proceed to compel the party to name, but assumed the power of nominating in his stead:—and can this be

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(a) Poth. Obl. 157. and Evans's trans. p. note a.

(b) Evans loc. cit. 4. Bro. Ch. 477.



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called a specific performance where the court instead of obliging the parties to name has taken upon itself to do so? In chancery the court extends the contract beyond the agreement of the parties. *Jordan v. Sawkins* (a) and *Tattersell v. Groote* (b) are cases perfectly parallel to the present and they are supported by the law of France. (c) Submission must be always voluntary. (d) Nobody but the parties can name *arbitres*, (e) and it is the duty of the courts to retain the administration of the laws (f) so that there is a perfect analogy between the law of England and the law of France. It might have been a question whether this case should not be governed by the law of England.

Judgment reversed.

HOWARD *against* THE SHIP CAMILLUS.

26th June.
 1823.

JUDGMENT.

JUDGE KERR. This is a suit brought by the master and owner of the snow *Hazard* against the ship *Camillus*, and the libellant complains of an injury done by collision in the river St. Lawrence near the city of Quebec.

- (a) 4. Bro. ch. 477.
- (b) 2. B. & P. 131.
- (c) Dic. de Dr. *arbitres*.—Charondas.—Brillon arbitre, No. 33. 1. Henrys, 439.
- (d) Guy Pape Quest 185.
- (e) Nouv. Den. v. Compromis. No. 2. Charondas liv. 4. Lacombe compromis, No. 1,
- (f) Bos. and Pull. 131. *Street v. Rigby*, 6. Ves. Jun. 517.

to the *Hazard*, on the river St. Lawrence, near the city of Quebec, by the people of the ship *Camillus*, who, when she was under a press of sail, so carelessly navigated her that she ran across the bows of the *Hazard*, whereby she sustained damage to the amount of £200. To this libel a declinatory exception has been pleaded, in which it is averred that the *locus in quo* of the pretended injury is within the body of the county of Quebec, and solely cognizable by the court of King's Bench for the district of Quebec.

The case of the ship *Trio* in which, some years ago, a prohibition issued to this court under circumstances similar to the present, has induced Mr. Jones the claimant, to consider that the question of jurisdiction over the river St. Lawrence has been put to rest : But no appeal was instituted in that case, nor was even the admiralty heard at all in support of its jurisdiction, and unless a question of such great importance, by which an extent of four hundred and sixty miles of sea is transferred from the admiralty to the courts of common law, by the decision of a tribunal in the last resort, I cannot admit that the question can be settled. It is only before the high court of admiralty, or before His Majesty in council, where the matter can properly and finally be decided.

During the time of the French a court of admiralty was established at Quebec, vested with powers more extensive than that of the court of vice admiralty, and in a maritime sense, the river St. Lawrence was then considered as part of the *altum mare*, for the *Ordonnances de la Marine* thus define what shall be considered as the sea, " sera réputé bord et rivage de la mer, tout ce qu'elle couvre et découvre pendant les nouvelles

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et pleines lunes, et jusque où le grand flot de mars se peut étendre sur les grèves." The maritime parts of *New France*, perhaps, extended further than are now claimed by this court, sitting under an English admiralty commission, for by it the jurisdiction of the court of vice admiralty extends to a cognizance of "every matter, cause or thing, business, or injury whatsoever, done or to be done, as well in, upon or by the sea, or public streams, fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, as upon any of the shores or banks adjoining to them." These are the words of the commission granted by the high court of admiralty to the Judge of the court of vice admiralty in the year 1763, soon after the establishment of the civil government in the then province of Quebec, and such are the terms of the same commission granted so late as the year 1797, to the present judge; so that it may be asked by what ordinance or statute, British or Colonial, is the jurisdiction over the river St. Lawrence, as far as the flux and reflux of the tide is visible, taken away from the admiralty and given to the colonial court of King's Bench? It has been said that the royal proclamation of the year 1763, has taken away the jurisdiction over the river St. Lawrence from the admiralty, and given it to the common law courts. But it cannot escape observation that this proclamation (if a royal proclamation could in law deprive the admiralty of its ancient jurisdiction,) was not intended to settle and adjust the local boundaries of the common law and admiralty courts, then about to be established. *Its*

only intention was to designate the limits of the newly acquired province of Quebec, so as to shew what portion of that territory should be placed under the care and inspection of the governor of Quebec. Nor was the proclamation of Sir *Ahured Clarke*, of the year 1792. with reference to the act 31st Geo. III. c. 31. conducive to the end for which it has been cited, considering its avowed purpose was to subdivide the province of Lower Canada, into counties, so as to guide the inhabitants in the exercise of their right of suffrage for members to the assembly, under the new constitution given to them by that act. If the jurisdiction of the high court of admiralty over this great arm of the sea could be taken away by inference (which I deny) no such inference can be fairly drawn from these public acts. The river St. Lawrence has been assimilated to the Thames, and Quebec to London, in order to sustain the position that the river near Quebec is *infra corpus comitatus*. But why assimilate this river more to the Thames than to the Bristol channel, to which it bears a much stronger resemblance, or to the mouths of the Tyne, the Mersey, or the Dee, all of which are *Æstuaries* of the sea; or to the Firth of Forth, which is exclusively within the jurisdiction of the high court of admiralty of Scotland?—The bason of Quebec has not, beyond the memory of man, as the Thames, been subject to the courts of common law, and indeed these courts have not themselves yet existed thirty years; nor can the bason near the city be strictly holden to be a port,—the definition of which is “*locus conclusus quo importantur merces et exportantur*,” for the river is not there shut up, but flows ninety miles above it,

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and is actually navigable for one hundred and eighty miles.

If the court of vice admiralty have no jurisdiction in this suit for an injury done on the waters of the St. Lawrence, the commission granted to this court is nugatory *vana est potentia quæ non in actum venit*, and if so, where is this libellant to seek for redress?—It is clear that it cannot be found in the court of King's bench, where the remedy lies only *in personam*, not *in rem*, and if the suit cannot there be entertained against the ship itself, no adequate relief can be had in that court.

The courts of King's bench exercise their functions under the provincial statute 34, Geo. III. cap. 6. by the 2nd clause of which, and that is the foundation of all their authority, it is provided, "that the said courts, in their respective districts aforesaid, shall have original jurisdiction to take cognizance of, hear, try and determine in the manner hereinafter enacted, all causes as well civil as criminal, and where the King is party, except those purely of admiralty jurisdiction." The words "*except those purely of admiralty jurisdiction*," must mean something, and if they import any thing, they must mean that these common law courts are prohibited from taking cognizance of "any matter, cause, or thing, business or injury whatsoever, done or to be done upon the sea or public streams, fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea," provided, as in this case, the proceedings are against the thing in specie.

After giving this case every consideration due to the importance of the question proposed, I have no hesitation in pronouncing a decree maintaining the ancient

jurisdiction of the admiralty over the river St. Lawrence, and dismissing this exception with costs.

Declinatory exception dismissed. *

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WILSON against NORRIS.

JUDGE KERR.—This information has been preferred against William Norris, master of the brigantine William, of Dublin, for penalties to the amount of £2500, for having taken from the port of Dublin and brought to Quebec, fifty passengers more than are permitted by law to be carried in the said brigantine, in contravention of the 57th of his late Majesty, c. 10.

I am free to confess, that in granting process against the defendant, I had some doubts as to the jurisdiction of this court over the offence alleged to have been committed; and to this point I was desirous of hearing the defendant by counsel; but Mr. Norris, though personally served with a citation, has not thought proper to appear in any stage of the proceedings: and the court must in this matter be entirely guided by its own judgment, assisted by such lights as have been cast upon it by the advocate of the informant.

11th August.
1823.

Under the words "court of session having jurisdiction in the port or place at which a ship shall arrive," contained in the 57 Geo. III, c. 10. § 8. the court of vice admiralty claims jurisdiction in proceedings for penalties and forfeitures under that act.

* The court of King's Bench awarded a prohibition to the vice admiralty in this suit upon a suggestion stating that the injury happened in the river St. Lawrence, and in the body of the district of Quebec. See the case of *Hamilton v. Fraser*, ante p. 21.

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The statute declares that the penalties and forfeitures to be incurred under that act, shall and may be recovered "in a summary way, in any court or courts of session having jurisdiction in the port or place at which such vessel shall arrive." If no former statute had granted to this court a right to entertain prosecutions for penalties and forfeitures under the trade and revenue laws, I should have felt much doubt whether the words "court or courts of session," in the statute, gave any jurisdiction in these matters to the courts of vice admiralty. But the 49th of his late Majesty, c. 107, in most express terms gives to the vice admiralty courts cognizance in such cases; for it provides by the first section, "that all such penalties and forfeitures," (speaking of such penalties and forfeitures as relate to the trade and revenue of the colonies,) "which may have been heretofore, or may be hereafter incurred, shall and may be prosecuted, sued for and recovered in any court of record, or of vice admiralty, having jurisdiction in the colony or plantation where the cause of prosecution arises."

In this view of the question, the court is not unsupported in its claim to a concurrent jurisdiction with other courts, in all prosecutions for penalties and forfeitures under the trade and revenue laws, by a distinct legislative enactment, providing against past and future violations of them; and I am necessarily led to this conclusion, that by the words "*court or courts of session*" this court is included.

The trite maxim, "*est judicis ampliare jurisdictionem*," which is to be applied with great caution, may in truth and justice be called in aid of this construction of these words; for if this court have no jurisdiction

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over the penalties in the 57th of George the III. then the provisions of it will become nugatory, there being no other court which has jurisdiction over the port of Quebec, *in session* at this time, nor will any other but the court of vice admiralty meet before the 21st September, and before that time the defendant may leave this province, all the witnesses may disperse; and thus the provisions of the act will be eluded.

The question then is resolvable in a short enquiry of fact, whether the defendant has incurred all or any of the fifty penalties for which the informant proceeds in demand in his libel; and after reading over the evidence taken in support of it, I must say that it exhibits a case of as lawless behaviour and moral turpitude as is rarely disclosed in a court of justice.

It appears from the evidence of Thomas James, the mate, that the brigantine sailed from the port of Dublin on the 14th May, and on the same day came to anchor opposite Dunleary New Harbour; that Norris, the master, was on board and went on shore in the same evening or next day in the morning; that he returned on board in the night of the 15th, at 11 o'clock; when he returned he said that when he was on shore he had heard that the ship had fouled her anchor, and that he must heave it up. Here he threw aside the veil, and touching the witness on the arm, he added, "d'ont take any notice of my being in a passion or what I say, but the ship must go to sea immediately; that if she did not go to sea that night she would be stopped and not allowed to go."—He further states that there were then two custom house officers on board, and that by the master's orders the anchor was weighed

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and the ship proceeded to sea, when touching at Howth harbour, about daylight on the 16th, the custom house officers were landed, and the brig proceeded on her voyage to Quebec.

The witness produces a paper which he says was given to him by Norris, shewing the number of families to whom as mate, he was to serve out water during the voyage; and this list contains in number, as far as I can understand from it, 119 souls. His evidence also goes to prove that there was hardly room to work the ship: that part of these families slept in the long boat on deck: and of the number, happily, only eleven children died, a circumstance that he attributes to the coldness of the weather.


James Hunt, a passenger, states that he, his wife 27 years of age, with a child and two relatives, embarked on board the brigantine the 14th May: that neither he or his family had a berth excepting his wife, who was nearly starved with cold, and was permitted for three nights to sleep in the cabin: that during the first ten nights, they were obliged to sleep between the berths; and at other times in the long boat upon deck. For the last three weeks of the passage, he says that they lay in the hold on some ropes, where the child he had with him died, and where his wife was delivered of another! He does not know the exact number of passengers, but he says that there were more than seventy grown persons, and upwards of thirty children, exclusive of children who died on the passage.

Walter Stiensin swears that there were at least 140 passengers, and that though he was promised a berth by the owner, a Mr. Ellis of Dublin, he was obliged to sleep in the long boat on deck by which he lost his

health and is now extremely ill. He says that he paid four guineas to the owner for his own and cousin's passage.

Though it appears that the passengers far exceeded the number restricted by the statute, which is "*one adult person, or three children under 14 years of age, for every one ton and a half of that part of the ship or vessel remaining unladen.*" Yet they all differ as to the precise number, which is not to be wondered at, considering the crowded state of the ship. However, the testimony of Mr. Fife, the custom house officer, who boarded the brig on her arrival, and who counted the passengers in the presence of Clifford, the other witness, enable the court to say with correctness that there were, exclusive of the crew, ninety seven grown persons, and forty four children, that were brought from Dublin in the brigantine William, a vessel of only ninety three tons burthen. Mr. Fife states that the ship was so filthy, and the smell between decks so offensive, that he did not venture to go below.

These are the facts which this informant discloses, and certainly the case is a deplorable one. It is in vain that the civilized nations unite to abolish the slave trade, and to mitigate the miseries of mankind, if, from the vile passion of avarice, which is "*semper infinita, insatiabilis,*" a traffic like this is permitted, with impunity, to be carried on between our shores, by which numbers of our fellow-subjects are taken hoodwinked from their homes, and consigned to miseries which can be compared only to those of the black hole of Calcutta. Happily in this instance, the mortality was not great, considering the crowded state of the ship; but, had the weather been warm and the winds less favora-

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ble, I do not think that one of the number would have lived to tell the tale of their sufferings.

Following the dictates of my heart and understanding, I find the fact and the law with the informant, and the facts being proved, the law points with unerring hand to this conclusion, that the penalties for the recovery of which the informant proceeds in demand, have been incurred, and I decree that the sum of £2500, sterling, be paid by the defendant, William Norris, one moiety to His Majesty, and the other moiety to the informant. *

EX PARTE upon the Petition of SAMUEL NEILSON for a Writ of Injunction and a Mandamus.

12th April and
 19th June,
 1824.

The court will not grant a *mandamus* to the sheriff to cause the sale of lands and tenements as directed by

the ordinance 25th, Geo. III. c. 33. to be advertized in a newspaper intituled "The Quebec Gazette," where it is not shewn that there is no other specific legal remedy.

Nor will the court grant an injunction to the King's printer enjoining him not to advertize the sale of lands and tenements under the same ordinance.

* An action having been subsequently instituted in the court of King's Bench upon the above decree, judgment was rendered on the 16th day of October 1823. dismissing the action, upon the ground that the court of vice admiralty had no jurisdiction in such cases.

Brown subsequently purchased Gilmore's share of the establishment and afterwards was appointed King's printer with a salary. After his death the establishment was purchased by his nephew Samuel Neilson, who continued the newspaper without however any commission, and left it, by his will, to his brother John Neilson. On the first day of May 1822. John Neilson sold his printing establishment and his right to the Gazette to his son Samuel Neilson and William Cowan. On the third day of July 1822, Samuel Neilson obtained a commission as King's printer and he continued to print the paper for his benefit, and that of William Cowan, his partner, in the printing establishment. Subsequently to the establishment of this newspaper, and during its publication, various ordinances and laws were passed in this province requiring certain public advertisements to be inserted in the Quebec Gazette, but particularly the ordinance 25th, Geo. III. c. 2. § 33. which is as follows :—" When lands
" and tenements shall be seized by the sheriff, under
" a writ of execution, he shall advertize the sale
" thereof, three several times, in the Quebec Gazette,
" to be on some certain day after the expiration of
" four months from the date of the first advertize-
" ment, and proclaim the said sale at the church door
" of the parish in which the premises are situated,
" immediately after divine service, on the three Sun-
" days next preceding the sale ; and cause a copy of
" the said advertizement to be fixed on the door of the
" parish church ; and that lands *en roture* shall be sold
" at the door of the church of the parish where seized.
" And the sheriff is hereby further required, to adver-
" tize, immediately after the seizure, that all and every

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“ person having any claim on said lands and tene-
 “ ments, by mortgage, or other right or incumbrance,
 “ do give notice thereof at his office, either before or
 “ after the sale, where the law makes a distinction,
 “ and to remove all doubts, the sale then by the she-
 “ riff, without any other formality, shall have the
 “ same force and effect as the *décret* had heretofore.”

From the time when this newspaper was established the notices, required by law to be published in the Quebec Gazette, were in fact published therein at prices agreed upon with the executive government, except when diminutions of such prices were voluntarily made by the proprietors. On the 30th day of October 1823. John Charlton Fisher, of the city of Quebec, Doctor of Laws, there printed and published another public newspaper styled “The Quebec Gazette” and advertised therein the sales of lands and tenements as required by the above recited ordinance to be inserted in the Quebec Gazette.

The above facts were established by the affidavits of John Neilson and Samuel Neilson.

SEWELL, CH. J. We have before us a motion on the part of Samuel Neilson for a writ of *mandamus*, directed to the sheriff of the district, commanding him to cause to be printed in a newspaper which is printed and published by Samuel Neilson under the title of “The Quebec Gazette” all advertizements required to be published in the execution of his office when lands and tenements are seized to be sold by *décret*. This motion is founded upon affidavits made by John and Samuel Neilson in which it is stated that in the year 1764. William Brown and Thomas Gilmore established in Quebec with their own funds, a newspaper

intituled "The Quebec Gazette." That William Brown subsequently purchased the said Gilmore's share of the establishment. That on the death of the said William Brown the said establishment was purchased by his nephew, Samuel Neilson, who continued the newspaper and left it by will to his brother John Neilson. That on the first day of May 1822. John Neilson sold his printing establishment and his right to the Gazette to his son Samuel Neilson and William Cowan, and that since that period the said paper has continued to be printed by the said Samuel Neilson and William Cowan for their benefit. It is also stated that during the whole of the time since the establishment of the aforementioned newspaper the advertizements required by the ordinance 25, Geo. III. c. 2. § 33. to be published in the Quebec Gazette when lands and tenements are taken in execution by the sheriff were published in the paper printed under that title by Samuel Neilson and his predecessors. The inference drawn by the applicant Samuel Neilson from the facts thus stated is this,—that by a just construction of the ordinance in his favor, the sheriff ought to be restrained from publishing his advertizements of sales by décret in another paper which is also intituled "The Quebec Gazette" and is published under the authority of the Crown by His Majesty's printer, and the *mandamus* is asked to restore him to the right of printing all such advertizements upon the ground that title to the Quebec Gazette originally printed by Brown and Gilmore is vested in the applicant and that the ordinance directs the sheriff's advertizements of sales by décret, to be inserted in the Quebec Gazette.

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The writ of *mandamus* is a prerogative writ to which the subject is entitled upon a proper case shewn to the satisfaction of the court. The object of this writ is to prevent disorder from a failure of justice, and it is used where the law has established no specific remedy and when in justice and good government there ought to be one. (a) There is however a great deal of difference between a *mandamus* to admit and a *mandamus* to restore, the former is granted merely to enable the party to try his right, as he would, otherwise, be left without any legal remedy. But the courts have always looked more strictly to the right of the party applying for a *mandamus* to be restored. In these cases he must not only shew that there is no other specific legal remedy. He must also shew a *prima facie* title in himself to the right which he claims, by laying before the court such facts as will warrant them in presuming that the right is in him. (b) Lord Mansfield has expressed the rule in this respect in very few words in the case of *The King v. The Bank of England*, "Where an action" says his Lordship, "will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *mandamus*." (c)

How can the right of the party applying in this case be said, from the facts laid before us, to be clear, when he has, himself, impeached that right by accepting and acting in the exercise of it under a commission from the Crown appointing him to be printer to

(a) *Rex v. Barker*, 3. Burr. 1265.(b) *The King v. Jotham*, 3. T. R. 575. *The King v. the Archbishop of Canterbury*, 8. East. 219. (c) *Douglas*, 526.

the King ; when it is not sworn in any of the affidavits that the original printers of the paper were not in the service and pay of the Crown, as printers to the King, when the ordinance was passed upon which he founds his right, and it is sworn that the prices paid for printing the sheriff's advertizements have at all times been settled by agreement,—not with that officer,—but with the executive government ; when it is not sworn that any right or title to Brown and Gilmore's Quebec Gazette, was ever vested, by any transfer of any description, in Samuel, the brother of John Neilson, from whom he derives his own right and title by the will of Samuel and the assignment of John, it being sworn that Samuel purchased the establishment and no more.

Or, can we presume the right to be vested in him when from the deposition of John Neilson, it is apparent that the right,—if any there be,—is vested in him and one William Cowan jointly.

Upon the ground, therefore, that the party applying for the *mandamus* has not laid before the court such facts as will warrant us in presuming that the right claimed is in him ; and upon the further ground that he can try his right,—if he has been legally dispossessed of it without colour of title,—by an action for money had and received for the profits, (a) or by an information in the nature of a *quo warranto*,—if what he claims is to be considered as a right to execute an office, and any other person is in possession of it with an apparent title,—(b) which of itself is a decisive answer to the present application for a *mandamus*.

(a) *Rex v. Jotham*, 3. T. R. 575.

(b) *Rex v. the Mayor of Colchester*, 2. T. R. 259.

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A motion has also been made in this cause for injunction commanding and enjoining John Charlton Fisher, his servants, workman and agents to desist from printing and publishing in the Quebec Gazette (a paper purporting to be printed by him as printer for the King) the advertizements by law required to be published in the Quebec Gazette, when lands and tenements are seized by the sheriff under writs of execution; and the same affidavits are offered in support of this motion for an injunction as are offered in support of the motion for a writ of *mandamus*. By admitting that by law the advertizements of sheriff's sales must necessarily be inserted in the Quebec Gazette, printed by Samuel Neilson, will it follow that John Charlton Fisher has not a right to insert the same advertizements in the King's Gazette if he see fit to do so?—It is plain that there is no ground whatever for the injunction which has been asked.

It is ordered therefore, that Samuel Neilson take nothing by his petition for a *mandamus*, or by his motion for an injunction.

PEDDIE *against* THE QUEBEC FIRE ASSURANCE
COMPANY.

20th June,
1824.

In insurance
against fire
the insurers
pay the whole
of any loss which does
not exceed the amount insured although the goods
insured be of greater value.

THIS was a case upon a policy of insurance against fire. The plaintiff insured the sum of £350 upon his

furniture, which was admitted to be of the value of £722. By fire so much of his property was consumed as amounted to £190, and this action was brought to recover the entire sum of £350, which the plaintiff had insured. The defendants paid into court £238 19s. $\frac{1}{2}$ d. as a sum which bore the same proportion to the amount of the loss, that the sum insured bore to the whole value of the furniture insured, and contended that they were not answerable for the same.

This cause was argued in the last term, and on this day the unanimous opinion of the court was delivered by the CHIEF JUSTICE, as follows :

The rule as to the construction of contracts in general is to give to language its true effect, according to the intention of the speaker or writer, as inferred from the whole expressions, and the nature of the occasion to which they are applied : and policies of insurance are to be construed by the same rule, unless by the known usage of trade, or the like, particular words or particular expressions have acquired a peculiar meaning and import distinct from their ordinary and popular sense. The policy of the Quebec Fire Insurance Company commences in the following words, viz : " This policy witnesseth that A. B. (the person insured,) has paid into the office a sum certain, in consideration that he, the person insured, in the event of any loss or damage by fire upon the property in the policy particularized, named and described, in the place or places herein set forth, and not elsewhere, shall have a claim not exceeding the sum or sums insured," and this is followed by a specific engagement and covenant on the part of the company, in consideration of the premium so paid, which is in the following words,

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viz: "The Quebec Fire Assurance Company do hereby promise to pay, make good, reinstate, and satisfy unto the said insured, his heirs, &c. all such damage or loss as shall happen by fire to the property described in the policy, and that the insurers undertake to pay and make good all such damage or loss as shall happen by fire to the property insured, within the value of the sum insured; yet it is contended in this case, that the insurers are liable to make good a part only of the sum insured, notwithstanding the amount of the loss and damage actually sustained upon the property insured, is more than the amount of the sum insured; that a certain proportion only of the value of that property was insured, and consequently that the claim of the plaintiff for the loss and damage he has sustained must be calculated with reference to the whole value of the property upon which he insured, and must bear the same proportion to the amount of the whole loss, that the whole loss bears to the whole value of the property insured. This is a strong conclusion against this pretension that there is no instance of a similar demand to be found in the books in any case of insurance against fire. The construction contended for might perhaps obtain, if an insurance against fire was held in law to be merely an insurance of things *in se*, to which the policy refers for, in such case if £500 was insured generally against fire upon a library of 1000 volumes, each being of the

value of 20s. the insurance would necessarily apply equally to every volume, and consequently every volume being insured for one half only of its value, the loss of 500 volumes by fire would render the insurers liable for the sum of £250 only.

But in point of fact, an insurance against fire is held in law to be a contract of personal indemnity, by which the insurer undertakes to *guarantee the person insured* against all loss and damage which he may sustain by fire upon the property insured, to the amount of the sum insured. There is certainly a great dearth of authorities and cases upon the contract of insurance against fire, but there are enough to establish this point. By the contract of insurance against fire says the late Mr. Serjeant Marshall, in his Treatise on Insurance, (a) the insurer, in consideration of a certain premium received by him either in a gross sum or by annual payments undertakes to *indemnify the insured* against any loss or damage which he may sustain in his houses, goods or merchandize by fire, during a limited period of time. A policy of insurance says the Lord Chancellor KING, in the case of *Lynch v. Dalzell*, (b) is merely a special agreement with the person insuring, that the insurer *indemnify* him against such loss or damage as he may sustain by fire. But the language of Lord Hardwicke, in the case of the *Saddlers' Company v. Badcock*, (c) is the most in point. The Society of the Hand in Hand office, (says his Lordship,) are to make satisfaction in case of any loss by fire. But to whom, and for what loss are they to make satisfaction? Why to the person insured, and for the loss he may have


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(a) Vol. 2. 784. (b) 4. Brown P. C. 435. Tomlin's edit.
(c) 2d Atkyns, 554.

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sustained. It cannot properly be called insuring anything, for there is no possibility of doing it, and therefore it *must mean insuring the person from damages.*

The writers upon our own law have scarcely touched upon the contract of insurance *against* fire, but as they have gone, they perfectly coincide with the opinions expressed in the authorities which have been cited. This will be seen upon reference to *Leca*, *Denisart, v. Assurance, (a)* and *Pothier's Contrat d'Assurance. (b)*

Upon the whole we are of opinion that the plaintiff is entitled to recover from the defendants in this action, the whole amount of the loss and damages which he has sustained by fire, according to the declaration. And the judgment of the court, therefore, is for the plaintiff.

(a) Sec. 1. No. 1. (b) Nos. 2. 3. 4.

In insurance against fire the insurers usually stipulate in the policy to pay the whole of the loss which does not exceed the amount insured; that is, if one thousand dollars be insured on furniture, goods, or a house worth two thousand dollars, and damage happen by fire to the amount of one thousand dollars, the insurer pays for the whole damage; whereas according to the principles of adjusting a partial loss under a marine policy he would pay for but half of it.—*Phillips on Insurance p. 375. in notis.*

WILLIAM PRICE *against* MICHAEL HENRY PERCEVAL.

6th Sept.
1824.

THIS case was called for the adduction of evidence before the CHIEF JUSTICE and KERR *Justice*, when Black, of counsel for the plaintiff, called upon the defendant to produce various documents pursuant to notice :

The Advocate General and *Primrose*, for the defendant, objected that, as it appeared by the bill of particulars, the action was brought to recover back sums of money demanded and received by the defendant from the plaintiff, as fees of office due and payable to the defendant as collector of His Majesty's customs at this port ; and that the sums of money, so sought to be recovered back, were stated to have been received by the defendant between the fifth of May and the eighteenth of November 1823, both days inclusive :—1. No evidence could be received until the plaintiff had proved one month's notice of action under the statutes 23rd, Geo. III. c. 70 ; 24th, Geo. III. sec. 2, c. 47 ; and 28th, Geo. III. c. 37.—2. That under the provisions of these statutes the action should have been commenced within three months next after the matter or thing done. The action was brought to recover back money, either wilfully or inadvertently taken by the defendant as fees of office, and being brought against him as a custom house officer, for an act done by him *colore officii*, or by reason of his office, he was clearly within

In an action against a collector of the customs, to recover back money exacted by him as fees of office, he is not entitled to one month's notice of action.

Nor can he object that such action should have been commenced within three months from the time when such fees were paid.

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the provisions of the statutes in question. The was not merely intended to protect persons acting within the strict line of their duty, but to protect them from the consequences of any excess, inadvertently committed in the exercise of their office. The fees of the officers of the customs were established by various acts of the Imperial Parliament, and having such legal foundation formed a part of the office to which they belonged. This action was not merely for a non feissance, but for a misfeasance, in taking more than the defendant was entitled to, for it was admitted that he was entitled to some fees; and on the whole it was contended, that although these formal objections might be considered as evincing a disposition, on the part of their client, to evade the main question, they felt themselves bound by professional duty to take them; and moreover they were supported by the case of *Greenway v. Hurd*, (a) which in an action brought against an excise officer, to recover back duties paid after the act of parliament imposing them had expired, such notice was held necessary. They also cited *Saunders v. Saunders* (b) and concluded by stating that as they considered the preliminary objections decisive in their favor, they desired that they might be disposed of before proceeding to the examination of the witnesses; for, by an act of parliament peremptorily enacted, that no evidence whatever could be received, until such notice should have been proved. The court therefore was bound to give their opinion, *in limine*, whether or

(a) 4. T. R. 553. (b) 2. East 253.

the defendant was within the protection of these acts of parliament.

Black, for the plaintiff, said that the acts in question did not afford the defendant the protection which he claimed. The public interest required that officers of customs and excise should be protected in the discharge of their duties for all acts by them done *bond fide* for the enforcement of the laws of customs and excise ; even when according to the strictness of the common law they would be liable to damages. Without such protection it was obvious that frauds on the public revenue might be committed in various forms with impunity. But this protection was conferred upon them, not for their individual benefit, but for the purpose of securing the full and just execution of the laws of trade, shipping and revenue. No such consideration of public policy can apply to the fees to be received by these officers for their own services in the discharge of the duties imposed upon them. There was no reason why, in respect of such fees, these officers should not be under the same liabilities, both civil and criminal, as are all other officers under the King's government. It was not of an improper exercise of authority in the enforcement of the revenue laws of which the plaintiff complained ; nor, as in the case of *Greenway v. Hurd*, for an abuse of the discretion in the defendant ; but it was for exacting and receiving money as due to him for fees, to which by law he had no title. The act complained of was not done by reason of his office, *virtute officii*, but by color of his office, *colore officii*, which was the true distinction on such occasions. On general reasoning therefore, the objection taken could not be supported.

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There were however positive authorities upon point, and the cases of *Irving v. Wilson* (a) and *Phelby v. McLean* (b) were cited. In the latter it had been expressly decided that notice of action under the statutes, was not necessary in an action against a collector of taxes for retaining too large a sum as fees out of the produce of property distrained.

The *Advocate General*, in reply insisted that the cases cited were perfectly distinguishable from the present because if it had been the intention of the legislature to confine the provisions of the statutes requiring notice to actions of tort, or if the object had been merely that they might tender amends, it would have been so stated. If the act were held not to extend to actions of assumpsit, it would then become nugatory for in every case one might waive the tort, and sue in form *ex contractu*.

SEWELL, CH. J. I cannot entertain a doubt upon this question. The provisions of the statute are obviously dictated by reasons of public policy and are intended to protect the public officer in the fair execution of his duty towards the public. The legislature with this view has enacted, that no action shall be instituted against him after the expiration of a limited period, and that he shall have a month's notice of any action which it may be intended to institute against him within that period. But this is not an action brought to recover back any portion of money belonging to the public; it is for money had and received by the defendant as fees of office *due to him* and which, as he alleges, he has a right to retain.

(a) 4. Term. Rep. 485. (b) Barn and Ald. 42.

his own use. By what law, between man and man, is any person authorized to retain money which *ex æquo et bono* he ought to refund, because it has been in his possession for the space of three months? "I do not see" said Lord ELLENBOROUGH in the case of *Wallace v. Smith*, "how acts of spoliation can be said to be done in pursuance, or by colour of an act of parliament." (a)

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The current of authorities support this distinction. In *Irving v. Wilson*, which has been cited at the bar, the action was instituted by the owner of certain goods, for money paid to a custom house officer to redeem them from a seizure to which they were not liable, and Lord KENYON held that the action was well brought and that notice was not necessary. The case of *Greenway v. Hurd*,—which has also been cited at the bar, on the part of the defendant,—came afterwards before the same learned judge; but the principle, upon which it was decided in this case that notice *was* necessary, was quite different from that on which in the preceding case of *Irving v. Wilson* it was decided that notice was not necessary. In the case of *Greenway v. Hurd* the action was brought to recover certain *duties* received by the defendant after the act which imposed them had been repealed, the demand was for money which had been paid to the defendant in his public capacity, for the use of the public, and it was, moreover, in evidence that the defendant had paid over the whole amount, which he had received, to his superior in office. There was no discrepancy, therefore, in these decisions of Lord

(a) 5. East R. 119.

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KENYON. But the case of *Umphelby v. McLean* is conclusive. In that case the action was for money had and received, and was brought to recover the amount of an excessive charge made by the defendant as a collector on a distress for arrears of taxes, and it was held that the defendant was not entitled to a month's notice before action brought. I am, for the reasons, of opinion that the objection which has been taken by the defendant must be overruled.

KERR, *Justice*. The question appears to me, upon the short time I have had to consider it, one of great importance, as connected with the duties of a high public officer, and, in the absence of direct authority, I cannot without further consideration represent myself as master of the subject.

No order was made, but the question was reargued in the term following and the objection overruled by the whole court.

ON APPEAL FROM MONTREAL.

FLEMING..... *Appellant.*

and

THE SEMINARY OF MONTREAL, *Respondent.*

18th & 19th
 January.
 1825.

The opinions
 of two mem-
 bers of the
 court, in the
 degree of rela-
 tionship of
 brothers in-
 law, cannot be reckoned as one under an edict of 1681, and a declaration of
 the King of France of 1708.

IN this case the corporate existence of the Seminary of Montreal was involved, and its competency to exercise seigniorial rights over the island of Montreal.

law, cannot be reckoned as one under an edict of 1681, and a declaration of the King of France of 1708.

nied. It was argued in the term of January 1824, but no decision was rendered, and the court ordered a rehearing, the court being then equally divided in opinion.

A rule upon the appellant was obtained to shew cause why the opinions of two members of the court, viz: the Chief Justice of the province, and the Honorable William Smith, brothers in-law, should not be reckoned as one, and why judgment should not accordingly be entered up in affirmance of the judgment of the court below.

Bedard and Vallières de St. Réal, in support of the rule, contended that by an edict of January 1681, and a *declaration* of August 1708, (a) the King of France had directed that the opinion of all judges, bearing to each other the affinity of father in-law, son in-law and brother in-law should, when uniform, be reckoned but one opinion. These laws having been enregistered in the *Conseil Supérieur* of Quebec, were in force in this country. That they were only declaratory of the common law of France. That the two honorable judges before mentioned came within the operation of those laws, and a majority of votes being thus established in favor of the Seminary, that judgment should be rendered confirming the decision of the court of King's Bench at Montreal. (b) That the functions of judges in England materially differed from those of judges in Canada. In England their labors were applied to the interpretation of laws, the facts being ascertained by a jury. *De jure respondent judices, de facto respondent juratores*. On the contrary the judges in this country enquired concerning the facts as well as the law of a case. That

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(a) Edits and Ordon. 397.

(b) Ravaut 128. Poth. Proc. Civ. 90.

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they are *recusable* in the like manner as in England jurors are subject to be challenged.

Buchanan, contra, argued; 1. That these edicts of the French King had been rendered wholly inoperative by the judicature act, 34. Geo. III. c. 6. § 23. which in erecting a court of appeals, qualified all the members of the Executive council to be judges of that court with the single exception of the judges who sat in the same cause in the court below. This sole exception shewed the generality of the rule, according to the maxim, *exceptio firmat regulam*. 2. That these laws of the French King could not be enforced without annihilating or at least abridging one of the King's highest prerogatives, which consisted in naming without controul, all officers to administer justice in his dominions.

As to the royal prerogatives, it was a well settled distinction, that the King exercises over a conquered country, the *major* or transcendant prerogatives annexed to the Crown of England, and that the local jurisprudence of the subjected dominion regulated the minor prerogatives of the Sovereign. (a) One of the noblest attributes of the King of England was that being considered the fountain of justice, a prerogative which he could not exercise without the unlimited power of appointing his officers, of whose fitness and capacity he was, according to the law of England, the only proper judge. (b)

The *recusation* of judges, although not now permitted in England, was formerly practised according to

(a) 1 Black. Com. 239. Chitty on Prerog. 25-6.

(b) Chitty, 6-75. Buc. Abr. v. Prerogative D. 3. p. 531. F. 1. 578 lb. courts. B. 97.

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'a

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the jurisprudence of that country, the earlier writers stating distinctly that judges could be recused or challenged for good cause. It does not appear that they departed from this practice because the judges had not the power of enquiring into facts, a reason which would have applied at a period long anterior; but because such a proceeding was deemed derogatory to the dignity of the judges, and subversive of that veneration for them which the law of England has for its policy to inculcate upon the people. (a) Allowing our judges to be assimilated to jurors, it does not appear that affinity in any degree between two jurors would be a reason of challenge to one of them. In Scotland, where a similar system of administration had prevailed, recusation *ratione suspecti judicis* had never been extended to consanguinity or affinity between members of the court, such a relative situation of a judge to one of the parties being there the utmost extent of this species of challenge. (b) In truth the necessity of such a regulation in France might be easily imagined, a country where judicial offices were venal, (c) and might be purchased to any extent by persons of the same family; but in the British empire the same reasons could not be alleged in favor of such a principle, as the King appointed his officers from a consideration of their individual integrity and ability.

Vallières de St. Réal, in reply:—

There could be no implied repeal of the edicts by the judicature act, as those laws could well subsist together, the latter merely erecting a court of appeals

(a) 3. Black. Com. 361. 2 Bac. Abr. Courts 97.

(b) Erskines Instit. 32.

(c) 2 Domat. 154.

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the former only directing the mode in which all courts should administer justice. I admit the King's assent, as fountain of justice, it is a prerogative which our Sovereign enjoys in common with the Kings of France, and other princes. But I contend that there was nothing in that prerogative which exempted His Majesty from administering the laws according to the jurisprudence of this country, that jurisprudence which the late King by the 14th of his reign had bound himself to observe in the Province. If there is no analogy between the office of judge in this country and that of jurors in England, there is at least, similitude between a sheriff considered as a judicial officer in England and our judges; and it could not be denied that suspicion of partiality in a sheriff was a cause of challenge to an array. The present application differs from recusal, as it does not tend to exclude the judge from the seat, but went only to regulate the weight which his opinion should be entitled to under peculiar circumstances.

The court, having taken time to consider of its judgment, made an order that the respondent should take nothing by the rule.

PRICE *against* PERCEVAL.18th April,
1825.

THIS was an action for money had and received, brought by the plaintiff, against the defendant, to recover back the amount of certain sums of money which had been claimed and received by the defendant in his capacity of collector of the customs, at the port of Quebec, as lawful fees of office, under the authority of the 27th section of the British statute, 5th, Geo. III. cap. 45, which, "in order to prevent any disputes concerning what fees the officers of His Majesty's Customs in the British colonies or plantations in America, may be entitled to, for making entries, or other business done by them in the execution of their employments," (until such time as the same shall be otherwise settled by the authority of parliament, and provided also that the fees taken are not contrary to the express direction of any act of parliament made in Great Britain,) enacts, "that in all and every port or place on the continent of America within His Majesty's dominions, where no fees have been received by any officer of the customs, such officer shall be entitled to the same fees as have been received by the like officers in the nearest port in the said colony or plantation, on or before the 29th

No fee of office can be exacted by a public officer unless established by legislative enactment, or by ancient usage which presupposes the sanction of legislative authority.

The action for money had and received will lie for exorbitant fees paid to customhouse officers, and in the name of the owner of a vessel although paid by the master.

The Imperial Statute 5th, Geo. III. c. 45. enacts that where no fees have been established in a colony of Great Britain, the customhouse officers there shall be entitled to receive such

fees as were received by the like officers in the nearest port in any British colony before the 29th September 1764, and the court will take notice of the relative geographical positions of countries to ascertain that port.

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day of September 1764, and if no fees have been received by any officer in any port in such colony or plantation, such officers shall be entitled to such fees as have been received by the like officers in the nearest port within any British colony or plantation on or before the said 29th day of September 1764. The plaintiff averred that the fees taken by the defendant were exorbitant, and that they had been received without any lawful or sufficient authority.


Black, for the plaintiff,—*The Advocate General* *Vallières de St. Réal* and *Primrose* for the defendant.

SEWELL, CH. J. This case has been extremely well argued on both sides, and is now to receive the final decision of this court upon the merits. Objections have been made to the form of this action, but the case of *Stevenson v. Mortimer* which was cited at the bar shews that the action for money had and received lies “for exorbitant fees paid to custom house officers” and “that it is well brought by the owner of the vessel upon which they have been paid by the master.” The same case, coupled with what is said by Lord KENYON in the case of *Irving v. Wilson*, (b) shew also, that money taken by officers of the revenue which they are not authorized to demand, “cannot be called a voluntary payment.”

Objections have likewise been urged against the evidence which is before us. It has been said that the fees to be taken at the port of Quebec are those which on the 29th September 1764. were taken at the nearest port, and that Halifax ought therefore to be proved

(a) Cowper 805. (b) 4. T. R. 485.

be the nearest port ; and it has also been said, that nothing but the original table of the fees taken at Halifax can be received in evidence. To the first it would probably be a sufficient answer to say, that there are many facts of public notoriety which courts of law are bound to notice without strict proof, and that of these the relative geographical positions and general limits of Provinces, *inter se*, must be one : as Halifax therefore was the only port of Nova Scotia in 1764, and as Nova Scotia at that period included the present Province of New Brunswick and consequently was bounded by Canada, if we measure by land, the port of Halifax,—being co-extensive in its limits with the Province of Nova Scotia,—was in this view of the subject, in the year 1764 the nearest port ; and if we measure by water, which seems to be the proper construction, Halifax, if even locally considered, was still the nearest port, as it was the first at which a ship would arrive in a voyage from Canada along the sea coast of the then British provinces in America. It is not, however, necessary to have recourse to any legal presumption of this description. For although it be true, as was argued, that the best evidence is to be given that the nature of the case admits, it is equally true that the strongest possible assurance of a fact is not required ; and that when a defendant, against whom it would otherwise be requisite to produce particular proof of any fact, has by his own conduct precluded himself from disputing that fact, strict proof is not required. (a) Now in this case, the defendant founds his right to retain the money which is demanded, as

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(a) 2. Phillips on evidence, 209. 215.

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much upon the Halifax docket or table of the taken at the custom house of that port on the 29th September 1764. as upon the statute 5th, Geo. cap. 45, and no other than the Halifax docket is evidence on either side. The copy of this docket table of fees (on which the plaintiff relies, as well as the defendant) has been produced and filed by the latter upon notice from the plaintiff to produce it, and it is in evidence that this copy has been for many years suspended publicly in the custom house at Quebec, as the tariff of the port, and was upon many occasions referred to by the defendant *personally*, in his authority for the fees which he claimed and received ; and this conduct is an admission on the part of the defendant that Halifax on the 29th September 1764. was the nearest port ; for if this was not the case, he can have no right to fees upon the authority of the Halifax docket. This conduct of the defendant is also an admission that no fees were taken at the port of Quebec, or in any other port of Canada, before the 25th September 1764 ; and consequently an answer to another objection which he has made to the evidence before us, by which it is urged, that as he is charged with a breach of duty, it was incumbent on the plaintiff to prove this charge, though it might involve a negative, and that the plaintiff under the statute 5th, Geo. III. cap. 45, was bound to prove, that no fees were taken at the port of Quebec, antecedent to the 29th September 1764 ; for, if any fees were taken at the port of Quebec, or in any other port of Canada before that day, the defendant cannot have no right to fees upon the authority of the docket of a port in another province. It is an answer and

to the argument which has been raised upon 10th, Geo. III. cap. 37, and the 45th, Geo. III. cap. 68, by which the former statute is made perpetual. For although these statutes declare, "that the officers of the customs in the colonies may lawfully demand and receive such fees as they and their predecessors respectively were and had been generally and usually accustomed to demand, take and receive *before the 29th of September 1764.*" yet if no fees were taken by the custom house officers of the port of Quebec before that day, these statutes can have no bearing upon the question now before us.

To the objections which have been made against the admissibility of the proceedings had in the Legislative Council and Assembly, in evidence, we do not deem it necessary to advert. We are of opinion that the question before us is an abstract question of legal right, as to the several fees which appear from the parol testimony adduced in the cause to have been received from the plaintiff by the defendant; and therefore a question which, without reference to these proceedings, must necessarily be decided by the statutes which relate to the subject, and by the Halifax docket, which for the reasons before stated, we hold to be legally in evidence before us.

The establishment of fees to be taken by the officers of any government, is an act of legislation and in its effect an act of taxation. It is a declaration that such officers shall not be obliged to discharge the duties required by law, in their several stations, without a fixed reward; and as this reward is to be paid by the subjects of the government, it is to them a prescribed rule of action, which they cannot but obey when the execution

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of the duties so required is asked on their behalf; and a tax because their obedience to this rule of action unavoidably takes money from their pockets. With it is not in the power of the Crown to create any new offices with new fees annexed to them, or to annex new fees to old offices. (a) So that fees, to speak generally, must either be established and ascertained by legislative enactment, or by ancient usage which presupposes the sanction of legislative authority. (b) And with respect to custom house fees, this is particularly true not only in the parent state, but in the colonies. In the 12th Car. II. cap. 4. sec. 7, it is enacted, "That the officers of the customs in the several ports where the goods exported or imported amount to the value of five pounds or more, shall take and receive such fees, and no other,—as were taken in the 4th year of the late King James, *until the said fees shall be otherwise settled by the authority of parliament.* By the 24th article "the rules, orders, directions and allowances." annexed to the same statute, (c) "for avoiding all oppressions by any of the officers of the customs in any port of this kingdom, in exacting unreasonable fees *from the merchants by reason of any entries, or otherwise touching the shipping or unshipping of any goods, wares or merchandizes.* it is ordered, "that no officer, clerk or other, belonging to any custom house whatsoever, shall exact, require or receive any other or greater fee of any merchant,

(a) 2 Inst. 553. 1. Black. Com. 272. (b) Chitty on Prerogative 81.

(c) Of these rules, &c. the 13th, 18th, 19th, 22nd, 24th and 25th, are enacted by the consolidation act 27. Geo. III. cap. 18. sec. 1st. 32d. 33d. and 34th.—See the statute and Nodins' British duties.

Under the authority of this section of the rules and orders, a book of fees for the Custom house, was established, A. D. 1662. by the House of Commons, and signed by the Speaker. See Journals of the Commons 17th May, 1662, and Nodiu's British Duties p. 37. where it will be found.

or, whatsoever, *than such as are, or shall be established by the Commons in Parliament assembled.*" By 14, Car. II. cap. 11. sec. 34, double costs and damages are imposed by way of penalty upon every person "employed in His Majesty's Customs who shall demand or take any other or greater sum of money *than now is now due, or shall hereafter become due.*" And the 8th of Anne, c. 13, sec. 26, it is again enacted, that the fees of the officers of the Customs *legally payable on the 31st July 1710, shall continue payable till the 1st of January 1720, and shall hereafter be determined by the Commons of Great Britain in Parliament.*" In addition to these statutes, it is, by the 6th William III. cap. 1, sec. 5, provided that all officers of the Customs in the port of London, in the out ports *and elsewhere*, shall at their respective admissions take a solemn corporal oath, "that they will not take or receive any reward or gratuity, directly or indirectly, other than their respective salaries, and what is or shall be allowed them from the Crown, *or the regular fee established by law, for any service done in the execution of their employments in the Customs, on any account whatever;*" and by the printed instructions given by the Commissioners of the Customs to the collectors in America, it appears that this oath is taken under the authority of this act, as well by officers in the colonies as in England. Lastly, by the 27th section of the 5th Geo. III. cap. 45, which has already been stated at large, it is enacted, that the fees which custom house officers in the British American colonies are authorized *by the said act* to receive, and "may be entitled to for making returns, and other business done by them in the execution of their employments, shall be by them received until such time as the same shall be otherwise settled

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by the authority of Parliament." From these statements it appears evidently not only that the claims of customs-house officers to fees in the ports of British America are limited to fees which are established by law, but that they are due only for services required by law to be done in the execution of their respective offices, and actually performed by the officer; and this becomes the criterion by which the legality of the fees now in dispute between the parties in this cause, must be decided, it remains for us to enquire and to determine how many and which of them fall within this description.

Upon the first establishment of the North American colonies, Parliament thought it necessary to take some measures for the regulation of the plantation trade. By the act of 12th Car. II. c. 18, accordingly declared the qualifications, which should be required for vessels trading to the colonies, and enjoined the governor, or person by him appointed, to inspect and take care that the act in this respect was duly executed, and to take bonds for all vessels lading any of the commodities which it enumerated. By the act of the 15th of Car. II. c. 7, further regulations were made, and every person *importing goods into the colonies* was required to deliver to the governor of such colony, or to such person or officer as should by him be authorized and appointed, "a true inventory of all such goods." No duties were laid at this time nor until ten years afterwards upon any commodities in the plantations, but certain duties having been imposed by the act of the 25th of Car. II. cap. 7, on sugars and certain other articles, to be paid in the plantations, it was by the 2nd and 3rd sections of the same statute, enacted, "that the sever-

ies so imposed should be levied and paid to a collector or other officer in the plantation, as should thereafter be appointed, and should be levied under the superintendence of the Commissioners of the Customs in England." Such is the origin of the Custom-house in the colonies. It was afterwards enacted in the 11th and 6th sections, of the 7th and 8th William III. cap. 22, that the officers of the Customs in the plantations, "should be appointed by the Lords of the Treasury, and the Commissioners of the Customs in England," and that all ships coming into or going out of any of the said plantations, and lading or unlading any goods or commodities, and the masters thereof, and their ladings, should be subject and liable to the same rules, visitations, searches, penalties and forfeitures, as to the entering, lading, or discharging in their respective ships and ladings, as ships and their ladings, and the masters thereof are subject and liable in this kingdom," (that is to say in England,) "by the Statute of the 13th and 14th Car. II. cap. 11." It will therefore be proper here to state the general course of proceedings at the custom house in England, under the statute referred to in the 7th and 8th William III. cap. 22, as it tends to explain the fees enumerated in the Halifax docket, and the observations which we shall have to make hereafter upon the several items now in dispute. There are but few books of authority to which we can refer for this purpose, but there are none. "The master of every merchant ship," says *John Gilbert*, in his treatise on the court of Exchequer, "within three days after passing by Gravesend, in the port of London, and immediately upon his arrival in

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any of the out ports, (a) *is to make a true report at the clerk of the ship's entries office, of the marks, number, quantity, quality and consignment of his cargo; and of the name, tonnage and property of his ship; whether it is British or foreign built, and the port to which it belongs, the name of the place or places where he took the goods on board, the number of mariners, and how many foreigners there are among them,* (b)—*he is to make oath to his report, and to answer on oath, if required, to all such questions concerning his cargo, as shall be asked by the Customer or other officer, under the penalty of £100. "The merchant in 20 days from the ship's report is to make entry of his goods and pay the duties, and may enter part of his goods in one port, and the remainder in another."* "A copy of a bill of entry of goods inwards, in which the quantity of goods must be expressed in words at length, and not in figures, after it has been signed by one of the Commissioners, and by the proper officers, *is called a warrant* and is delivered by the warrant keeper to the King's waiters and land waiters, being *an authority to them to deliver the goods entered to the merchant.* The masters of ships cannot, upon entering outwards at the collector's office, give an immediate account of their cargo as in reporting inwards, for at first they only enter the ship, but the numbers, marks and quantities of the goods are taken afterwards at the searcher's office from the cocque and inserted in the reports which are from then transmitted to the collector, to which the master then makes oath. There is no time limited *for the merchant to enter his goods outwards, or for the ship to clear after the entry of it at the collector's office.*"

(a) Gilbert's Treatise on the Exchequer, p. 231. et Seq.

(b) Ibid. 332 and 243.

(c) Ib. 247.

A copy or bill of entry of goods outwards when  
 ed by a commissioner and the proper officers is  
 ed a cocquet, which goes to the searcher *as an*  
*authority for him to suffer the goods entered to be put*  
*board."* (a) "The pre-entry," says Lord Chief  
 Justice *Hale* in his treatise concerning the Customs,  
 is that entry which is made before the goods are  
 on board, if to be transported, or before the  
 goods *imported* be unladen, and is of two sorts, viz. ;  
*the entry, by the merchant or the owner, of the goods ;*  
*the entry by the master or purser, of the ship or*  
*essel. The entry of goods is nothing else but a note*  
*writing delivered in by the merchant, or those em-*  
*ployed by him, unto the King's officer of the Customs,*  
*stating the quantity, either in weight or measure,*  
*and the marks and kinds of goods by him imported or*  
*ported, to the end the King may be enabled to*  
*determine what duty to expect, and the merchant may*  
*be enabled, either to pay or secure or compound that*  
*duty, so that he may lade or unlade his goods safely*  
*without forfeiture."*—" *Touching the entry of the mas-*  
*ter, he hath the bills of lading, and by that means he*  
*exerciseth a kind of controul upon the merchant, and there-*  
*fore to the end the King may have all the means possible*  
*to prevent the defrauding of his duties, the master of*  
*the ship is to give an account of the goods under his*  
*charge."* (b) From these extracts, not only the gene-  
 ral course of proceedings in the custom houses in  
 England under the 13th and 14th of Car. II. but the  
 distinction between the entry of the ship, and the

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(a) Gilbert's Treatise on the Exchequer, 243. 247.

(b) Hale's Treatise, concerning the Customs, Hargrave's Tracts, vol. 1,  
 p. 219, 217 and 220.

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entry of the goods inwards and outwards, and the object of each entry respectively cannot but be clear. In strict conformity to this course of proceeding in England, to the distinction between the entries, and to the object of each, the 9th section of the statute 7th, Geo. III. cap. 46. prescribes the particular steps to be taken *by the master* in the declarations upon the entry and clearance of his ship, and enacts, "That *the master* or other person having the charge or command of every ship or vessel arriving in any British colony or plantation in America, shall, before he proceeds with his vessel to the place of unlading, come directly to the custom-house for the port or district where he arrives, and make a *just and true entry, upon oath*, before the collector of customs, comptroller, or other principal officer of the customs there, of the burthen, contents, and lading, of every ship or vessel, with the particular marks, numbers, qualities and contents, of every parcel of goods there laden, to the best of his knowledge; also, where she came in what port she took in her lading, of what country she was built, how manned, who was master during the voyage, and who are owners thereof, and whether any goods or what goods, during the course of such voyage, had not been discharged out of such ship or vessel, and where. And *the master* or other person having or taking the charge or command of every ship or vessel, coming out from any British colony or plantation in America, before he shall take in or suffer to be taken into lading on board any such ship or vessel, any goods or wares or merchandize to be exported, shall in the same manner enter and report outwards such ship or vessel."

th her name and burthen, of what country built, and how manned, with the names of the master and owners thereof, and to what port or place he intends to pass or sail, *and before he shall depart* with such ship or vessel out of any such colony or plantation, he shall *also* bring and deliver unto the collector and comptroller or other principal officer of the customs at the port or place where he shall lade, a *content in writing* under his hand, of the name of every merchant or other person who shall have laden or put on board any such ship or vessel, any goods or merchandize; and each master or person having or taking the charge or command of every such ship or vessel, either coming to or going out of any British colony or plantation (whether such ship shall be laden or in ballast) shall likewise answer upon oath to such questions as shall be demanded of him by the collector and comptroller or other principal officer of the customs, concerning each ship or vessel, and the destination of her voyage, concerning any goods or merchandize that shall may be laden on board her." It must be plain that this section is merely declaratory in detail of the several duties which were before required in effect by the statute 7th and 8th Will. III. cap. 22. of the master, and that it does not affect the entry inwards or outwards of the cargo. That the duties of the master, consequently relate exclusively to the ship, while the duties of the merchant as to the "lading" or cargo, and the entries of goods both inwards and outwards remain as before; so that the duties of the merchant and of the master respectively in the colonies are similar to the duties required of them respectively in England.

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After these general observations we proceed to the consideration of the several fees, which have been demanded and received by the defendant, upon the several entrances and clearances of the plaintiff's vessels, specified in the bill of particulars and in the evidence. These consist of fifteen items, all of which are charged against the ship, seven upon the voyage inwards, and eight upon the voyage outwards. The charges inwards are, for the ship's general entry, for the ship's report inwards, for a certificate of the ship's report inwards, for a warrant *to the master* to unload for the ship's anchorage, for recording the ship's register, and for an additional fee upon the entrance of the ship, upon the ground of her being a foreign topsail vessel. The charges outwards are, for the ship's report outwards, for a certificate of the ship's report outwards, for a warrant *to the master* to load, for a bill of the ship's stores, for a cocquet on the ship's stores, for a list of the ship's men, for the ship's general clearance, and for an additional fee upon the clearance of the ship, upon the ground of her being a foreign vessel.

We are of opinion that the charge of nine shillings sterling as a fee for the general entry inwards of each vessel is a lawful fee, and is properly a charge against the ship. The statute 7th, Geo. III. cap. 46, sec. 9 directs the master to make the ship's entry inwards and the services required from the collector by reason of the entry of each vessel have been performed by the defendant and, by the Halifax table of fees, it is proved that the same fee was received at the port of Halifax for the general entry of a vessel, on the 29th September 1764.

We are of opinion that the charge of one shilling and six-pence, sterling, as a fee due to the defendant on the ship's report inwards, in addition to the fee charged and received for "The general entry" is not a lawful fee, and cannot be retained, because the ship's report inwards is a component part of "the general entry," and is included in it. This appears from the form of the entry, contained in the printed instructions of the Commissioners of His Majesty's Customs, to the officers of the Customs in America, which according to the provisions contained in the 7th sec. of the statute 7th, Geo. III. cap. 46, describes the name, burthen, built, and property of the ship, the number of men, their country, the master, the voyage, and the marks, numbers, quantity, quality and consignment of the cargo, and subjoins the form of the entry which the same statute directs to be taken by the master in the following words, viz. : " I do swear that *the entry* above written now tendered and subscribed by me *is a just report* of the name of my ship, burthen, built, property, number, and country, of the mariners, the present master and voyage, and that it *both further* contain a true account of my lading." &c. It is in evidence that the entry of the vessels in question was made in this form, and it does not appear that any other report whatever of the ship or cargo inwards was made by the master of either. There are certainly cases in which a ship, coming into port, may report without entering, as where she is driven in by distress of weather, or comes in to receive orders, and in such cases, the fee now under discussion may be due, but it cannot be due if she enters, for she cannot enter without reporting, and as the general entry

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includes the ship's report, so the fee for the general entry includes the fee for the report.

We are of opinion that the charge of two shilling sterling, as a fee due to the defendant for a certificate of the ship's report inwards, is not a lawful fee, and cannot be retained. It has not been shewn that a certificate of the ship's report inwards is required by any statute, or that it is necessary for any purpose whatever, and it is in evidence that no such certificate was given in any instance of the several entries of the vessels in question.

We are of opinion that the charge of one shilling and six pence sterling, as a fee due to the defendant for a warrant *to the master* to unload, is not a lawful fee, and cannot be retained. It has been already shewn that the importing merchant is to make entry of his goods, and that a copy of his bill of entry, when signed by the proper officer of the custom house, is called a warrant, and is an authority to the land waiter, or rather to the landing waiter to unload them from the ship, and here we may add that this is confirmed by the 7th, 8th, 9th and 10th articles of the printed instructions given by the Commissioners of the Customs to the collectors of the Customs in the colonies, to which we have before referred; as therefore no goods, which require to be entered, can be landed without a warrant to the landing waiter, permitting them to be unloaded, *indorsed upon the importer's bill of entry*, a warrant to the master to unload is *as to such goods* of no effect whatever, and *as to all other goods*, (if there be any,) perfectly unnecessary. The warrant to unload is in fact "the Permit" of modern times



which is invariably taken out by the importer. If it is, there is no fee, according to the Halifax table of fees, for a permit, which can scarcely be supposed : on the contrary, if it be the permit, the warrant to the master to unload, and the permit or warrant to the merchant to unload, are duplicate authorities for one and the same purpose, and it must therefore be shewn that the master is required by some statute, to take out a permit or warrant to unload the goods of the importer as well as the importer himself, and this has not been attempted. It is lastly, in evidence, that no warrant to unload was given to the master in any one instance of the entries of the vessels in question.

We are of opinion that the charge of two shillings sterling, as a fee due to the defendant, for the anchorage of the vessels in question, is not a lawful fee and cannot be retained. We have endeavoured to trace the origin of this charge, but without success, it will, however, be sufficient to observe that the vessels in question, on each and every voyage inwards, *landed the whole of their cargoes*, and that the fee for anchorage, according to the Halifax table of fees, is due only “on vessels *that do not land the whole of their cargoes.*”

We are of opinion, that the charge of thirteen shillings sterling, as a fee due to the defendant for recording the register of the vessels in question upon each voyage inwards, is not a lawful fee, and cannot be retained. Vessels,—with certain exceptions,—are by law to be registered, and all new registers are in like manner required by law to be recorded, and according to the Halifax table of fees, a fee of thirteen shillings sterling, is to be paid to the collector for “new registers and recording the same.” It is not in evidence,

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however, nor has it been asserted that a new register was taken out or given to either of the vessels in question, in any one of the instances in which this fee was paid, and it is in evidence that the registers in point of fact were not recorded.

We are of opinion, that the charge of four shillings and six pence sterling, as a foreign topsail fee, due to the defendant upon each of the vessels in question, and upon each voyage inwards, is not a lawful fee, and cannot be retained. Both of the vessels in question, were built, registered and owned in the port of Quebec, and vessels so circumstanced, cannot be called "foreign" in any sense of the word. It is moreover admitted that the charge in the several instances in which the fee was paid, was made by mistake and error.

We are of opinion that the charge of one shilling and six pence sterling, as a fee for the master's report upon each of the vessels outwards, is a lawful fee, and is properly a charge against the ship. The statute 7th Geo. III. cap. 46. sec. 9. has enacted, "that the master or other person having charge or command of the ship, going out from any British colony in America, before he shall take in, or suffer to be taken into, or laden on board any such ship or vessel, any goods, wares or merchandize to be exported, shall enter and report outwards such ship or vessel, with her name and burthen, of what country built, and how manned, with the names of the master and owner thereof, and to what port or place he intends to proceed or sail." The services required from the collector by reason of this entry and report outwards, have been performed by the defendant, and from the Halifax tax

fees, it appears the same fee was received at that  
 rt on the 29th of September, 1764, for a report.

We are of opinion that the charge of two shillings  
 rling, as a fee due to the defendant, for a certificate  
 the ship's report outwards, is not a lawful fee and  
 cannot be retained. It has not been shewn that a cer-  
 cate of the ship's report outwards is required by any  
 tute, or that it is necessary for any purpose. The  
 ster by the 4th. Geo. III. cap. 15. sec. 36, is sub-  
 ted to a penalty if any goods are found concealed in  
 ship after his report outwards has been made, and  
 has been shewn that no goods which require to be  
 entered can be shipped for exportation before they  
 ve been entered outwards by the exporter, and a  
 sufferance in his name has been obtained. It is also  
 evidence that no certificate of the report outwards  
 either of the vessels in question was ever given.

We are of opinion that the charge of one shilling  
 and six pence sterling, as a fee due to the defendant, for  
 warrant to the master to unload, is not a lawful fee,  
 and cannot be retained. It has been shewn, as just  
 ed, that no goods, which require to be entered, can  
 shipped for exportation before they have been en-  
 ed outwards by the exporter, and a sufferance in  
 name has been obtained. The 16th article of the  
 nted instructions of the Commissioners of the Cus-  
 ns to the collectors of the Customs in the colonies,  
 ordinglly directs the latter not to grant any suffe-  
 ce, unless a proper entry shall have been made for  
 goods at the custom house; and the numbers XIX  
 and XX, of the papers annexed to these instructions,  
 forms of sufferance for the exporters to load, and  
 a cocquet thereon, which we have already seen was

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formerly the duplicate of the exporters bill, of presentation, signed by the proper officer of the Customs, (as there is no such officer in the Colonies,) as therefore no goods which require to be entered, can be shipped without a sufferance addressed to the shipping officer of the Customs, allowing them to be loaded, a warrant to the master to load is as to such goods of no effect whatever, and as to all other goods perfectly unnecessary. The warrant to load is in fact a sufferance which is always granted to the exporter, and if it is not, there is no fee, in the Halifax table of fees, for a sufferance, which can hardly be supposed, but on the contrary if it be the sufferance, the warrant to the master to load, and the sufferance to the merchant to load, are duplicate authorities for one and the same purpose, and it must therefore be shewn that the master is required by some statute, to take out a warrant to load the goods of the exporter, as well as the exporter himself, and this has not been attempted. It is moreover in evidence upon this item of charge, that no warrant to load was ever given to the master of either of the vessels in question.

We are of opinion that the charge of one shilling and six pence sterling, as a fee due to the defendant for a bill of stores, is a lawful fee, and properly a charge against the ship. A bill of stores is a licence to a ship granted in England at the custom house, to carry such stores and provisions, as are necessary for the voyage Custom free. The "ladings" of ships are by the 7th and 8th Wm. III. cap. 22. subject in the colonies to the same rules, &c. in the entering, lading, &c. as in England. And by the Halifax table of fees, it is

(a) Gilbert's Treatise on the Exchequer, p. 247.

rs that the same fee was received in that port for a
of stores on the 29th of September 1764. In point
fact it certainly may be doubted whether a bill of
res was given to either of the vessels in question,
as it may be inferred from the general tenor of the
evidence, that an equivalent to a bill of stores was in
ne shape obtained, since the stores were loaded, and
the charge in all other respects is, in our opinion,
lawful fee, we do not reject it.

We are of opinion that the charge of two shillings,
rling, as a fee due to the defendant for a cocquet on
res, is not a lawful fee and cannot be retained. A
cquet being, as before stated, a document which is
livered by the officers of the customs to merchants,
a warrant that their merchandize are customed, (a)
s *prima facie* no application to stores which are
pped custom free. The bill of stores being also a
licence" to carry the stores and provisions which
e "necessary for their voyage," is equivalent to a
cket ; (b) for originally (according to Baron *Gilbert*)
en goods were to be shipped outwards, instead of
fferance which permits goods to be shipped but
ects them not to be exported without further orders,
e exporter received, in the first instance, from the
ice of the customs a *licence* to export such goods,
hich was called a cocket. (c) It has not been shewn
at a cocket on stores is required by any statute,
ere is no specific fee for a cocket on stores in the
alifax table of fees, and it is in evidence, that no
cket on stores was ever given to the master of either
the vessels in question.

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(a) Law Dict v. Cocket. (b) Ibid. Bill of Stores.
(c) Gilbert's Treatise, 228 and 229.

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We are of opinion that the charge of one shilling and six-pence, sterling, as a fee due to the defendant for the list of men, is not a lawful fee and cannot be retained. If the defendant's claim to this fee be founded upon the 10th of Geo. III. cap. 37. it will be seen upon reference to this statute, that its operation is confined "to the ports of the British sugar colonies in the West Indies." If it be founded upon the 2nd and 3rd of Anne, cap. 6. sec. 14. that statute being enacted, "That no fee or reward shall be taken" for the list of men which the custom house officers are thereby directed to insert at the bottom of the docketts; and 5th, Geo. III. cap. 45. sec. 27. has provided, That no fee shall be taken by the officers for the customs in the plantations of America, and in the British islands in the West Indies "contrary to the express directions of any act of parliament made in Great Britain." We may add, that in a late statute (37th, Geo. III. cap. 73. sec. 5.) which again directs a list of men to be furnished *in the ports of the West Indies*, an express authority empowering the collector to receive fees upon such lists of men, is inserted. We are not aware of any other statutes than those which have been mentioned, which require a list of men. The Halifax docket does in fact contain a fee for such a document, but for the reasons which have been given at large, though we admit that the Halifax docket fixes the *quantum* of each lawful fee, it does not, in the opinion of the court, establish the legality of any.

We are of opinion that the charge of four shillings and six-pence, sterling, as a foreign topsail fee, due to the defendant upon each of the vessels in question

upon each voyage outwards, for the reasons which have already stated upon the similar charge in-
wards, is not a lawful fee, and cannot be retained.
Finally, we are of opinion that the charge of nine
lings, sterling, as a fee for the general clearance
wards of each vessel, is a lawful fee, and is pro-
ly a charge against the ship. The statute 7th,
o. III. cap. 46. sec. 9. directs the master "to enter
and report outwards before he shall lade any goods
to be exported," and then enacts that "before the
vessel sails, he shall deliver to the collector and
comptroller or other principal officers of the cus-
toms at the place of lading, a content in writing
under his hand, of the name of every merchant or
other person who shall have laden any goods in
such vessel, with the marks and numbers of such
goods, and shall answer upon oath to such questions
as shall be demanded of him by the collector, &c.
concerning such vessel, and the destination of her
voyage, or concerning any goods that shall or may
be laden on board." The services required from
the collector by reason of the general clearance of
such vessel, have been performed by the defendant;
and it is proved by the Halifax table of fees, that the
same fee was received at the port of Halifax for the
general clearance of a vessel on the 29th of Septem-
ber 1764.

It is the duty of every court to maintain and en-
force the claims of public officers for their lawful fees
on one hand, and on the other, to protect the King's
subjects against all demands for fees which are not
warranted by law. We have endeavoured to discharge
these duties equally, and if we have erred on either,

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we have the satisfaction to know that there are courts to which our judgments are amenable, as superior talents as they are in rank, and that, in those jurisdictions, our errors will be corrected.

KERR, *Justice* :—

I think it proper to explain briefly the reasons which induce me to concur in the judgment of the court, though I differ in some of the grounds on which the judgment ought to be rendered. As to the fees on these vessels *inwards*, I perfectly agree with the court, and for the reasons stated by the Chief Justice. As in respect to the *outward* fees, I think that one of the items, namely, that for a *bill of stores*, should be rejected, and that the item for a "*list of men*," should be admitted. The Halifax docket, of which so much has been said, seems to assign a fair *quantum meruit* for each particular service actually performed. But as the *bill of stores* appears in the evidence of Mr. Secretan, whether to have been asked for or delivered, on what ground can the defendant have been entitled to demand a fee for this service? In regard to the "*list of men*," I am for the same reason, of opinion, that it ought to be allowed as the duty has been proved to have been actually performed. It has indeed been thought by the court, that inasmuch as the 2d and 3d, Anne, c. 6. sec. 14. prohibits the taking of a fee for this service, that this fee is not of right demandable. But in the judgment, the statute 10th Geo. III. cap. 37. gives officers of the Customs a right to take such fees as were usually taken at the different ports in North America, previous to the year 1764, whether these fees had or had not been prohibited by any British act of Parliament. An act, indeed, did pass five years previous

Geo. III. c. 45. s. 27,) by which it is declared, that it shall and may be lawful for all and every collector and other officer of His Majesty's Customs in any British colony or Plantation in America, appointed by any deputation or commission from His Majesty's Customs in England, to demand and receive such fees as they and their predecessors were entitled to demand and receive, on and before the 10th September 1764, *provided the fees so taken are not contrary to the express direction of any act of Parliament made in Great Britain.*" In the subsequent these latter words are dropped, and it is thereby declared, "that every collector, comptroller, and other officer of His Majesty's Customs, and every naval officer in the said British colonies, shall be deemed to be entitled to, and shall and may lawfully demand and receive such fees as they and their predecessors respectively were and had been generally and usually accustomed to demand, take and receive, before the 10th day of September 1764." So that under the liberal provision of this latter statute, I am not to doubt that the officers of the Customs here have a right to take such fees as they or their predecessors were accustomed to take previous to that time. It has been remarked that the Halifax docket bears date in the year 1769, that is twelve months before the passing of the 10th of his late Majesty, so it may be fairly presumed that it was a tariff of fees which the officers of the Customs at all the British ports in America were accustomed to act upon. In this presumption I am confirmed by what is declared in evidence, namely; that both the Commissioners of Revenue enquiry in 1762, and the Commissioners of the Customs the year

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following, on being asked their opinion as to what should guide the Provincial custom house in its fees, referred them to this docket, which they considered of approved and undoubted authority. Nor can it be conceived from its publicity that it was a tariff of fees which had been taken before the year 1754, by all officers of the Customs in North America and had received the sanction of the Lords of the Treasury. The fee which I think ought to be allowed being in amount exactly the same as that which I think ought not to be allowed, the judgment of the court would, in either case be the same : of course I concur in the judgment.

PERRAULT and BOWEN, *Justices*, concurring in the opinion of the Chief Justice, Judgment was entered in favor of the plaintiff, for £14 4s. 8d. with interest and costs.

PATERSONS and WEIR *against* PERCEVAL.

EWELL, CH. J. This is an action on the case against Collector of the Customs as a ministerial officer, (a) refusing to perform a duty which he was bound to perform, in the execution of his office, by which the plaintiffs were injured. There are very few instances in which a public officer is answerable for an act fairly done in the performance of his duty to the best of his judgment. (b) An action on the case has been maintained against Commissioners of the Customs for an omission of duty simply, (c) and in all cases where the act of a public officer is *wilfully* done, that is to say, *is done contrary to his own conviction*, and shews *partiality* in the execution of the trust reposed in him, his conduct amounts to misbehaviour in his duty, for which he is fully answerable. (d) The plaintiffs in this cause have proved a case, which makes it impossible to suppose that mere error in judgment or mistake in law, was the cause of the conduct of which they complain. It appears that there are certain goods, such as hardware, Holland tapes and ounce threads, which in every instance are charged at the same gross prices, and deductions or discounts,—which vary according to the state of the market at the time of the purchase,—are made upon

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By the words "first or sterling cost," in the Prov. Stat. 53. Geo. III. c. 11. imposing duties on the importation of certain goods, is to be understood, the price paid for them at the place from whence they were exported, less the discount.

And an action on the case may be maintained against a collector of the Customs who refuses to admit the goods to an entry, until duties, as calculated upon the price of the goods, without a deduction of the discount, have been paid.

(a) Schinotti v. Bumstead, 6. T. R. 646.

(b) Drewe v. Coulton, 1 East, p. 563. note b. per Wilson J.

(c) Lacon v. Hooper, 6. T. R. 224.

(d) Buller, N. P. p. 64. Harman v. Tappenden, 1 East, p. 555. Drewe v. Coulton, *Supra*.

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the face of each invoice, so that the value of such goods,—usually called the short prices,—is ascertained by the amount of the deductions, and as the balance established is the price actually paid by the purchaser, it is consequently “*the first or sterling cost*” of goods so situated.

By the provincial statute 53, Geo. III. cap. 11, section 1 and 2, it is enacted—“that all and every person or persons whatsoever, who shall import or bring into this province, any goods, wares or merchandize of any kind whatsoever, shall immediately produce to the Collector of the Customs of the district wherein such importation shall be made, the original invoice of the goods, wares or merchandize which shall be so imported as aforesaid, and the importer or importers of such goods shall make and subscribe an affidavit, upon which the collector is empowered to take and administer the oath, and shall pay a duty of two pounds ten shillings per centum, to be calculated on the first or sterling cost of each one hundred pounds worth of such goods, and so in proportion for a greater or less quantity thereof.” On the occasion which gave rise to this action, the entry of a certain quantity of Holland tapes was tendered by the plaintiffs’ clerk to the defendant. He objected to the calculation of the duty upon the balance which remained after deducting, according to the invoice, discounts from the gross prices, and expressly refused to admit the goods to entry unless the duty was paid upon the gross prices without any deduction whatever. The plaintiffs then called upon the defendant by process to admit the tapes to an entry, and tendered the affidavit required by the statute, together with

ount of the duty calculated upon the *short prices*; notwithstanding this formal demand of his duty, defendant again refused in these words, "I make answer." The plaintiffs then, finding that the tapes could not otherwise be entered, paid the amount of the duty calculated upon the gross prices.

Now it is distinctly in evidence that the defendant had before been in the constant habit of admitting to pay all similar goods upon payment of the duty calculated upon the short prices; and that during the very period of his altercation with the plaintiffs, and after it, he admitted similar goods, belonging to others, to entry upon payment of the duty calculated upon the short prices. The inferences from these facts are irresistible; they show that the defendant's conduct towards the plaintiffs was contrary to his own conviction, wilful and wrongfully partial, and judgment must be entered against him for the damages demanded with costs.

J. Stuart and Black, for the plaintiffs.

The Attorney General for the defendant.

the remedy against a public officer, for neglect or misbehaviour, may be by an action on the case alleging his misdemeanour, or by an action of debt, according to the nature of the misfeasance, but never by assumpsit as an implied promise to do his duty. *McMillan v. Eastman*. 4. Massachusetts 378.

the words "true value," in an act imposing duties, mean the actual cost of the goods to the importer at the place from which they were imported, not the current market value of the goods at such place. *The United States v. Tappan*. 11 Wheat. 419.

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ON APPEAL FROM MONTREAL.

FRANÇOIS DESRIVIERES.....*Appellant*

and

THE HON. JOHN RICHARDSON and others, *Respondents*29th April.
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The Declaration of the King of France which requires a Licence in mortmain, in certain cases, is repealed by the Prov. stat. 41. Geo. III. c. 17. so far as respects the Royal Institution for the advancement of Learning.

The bequest of a sum of money to Trustees, for the benefit of a Corporation not *in esse* but in apparent expectancy, is not to be considered a lapsed legacy.

A similar bequest, to be applied towards defraying the expense to be incurred in the erection and establishment of a University or College upon condition that the same be erected and established within ten years from the testator's decease, such condition is accomplished if a corporate and political existence be given to such University or College by Letters Patent, emanating from the Crown, although a building applied to the purposes of such University or College may not have been erected within that period of time.

MCGILL, a gentleman of large real and landed state, made his will at Montreal on the 8th day of January 1811, by which he left a large portion of his fortune to the appellant, who was in no degree related to him by blood; and to shew his love of learning, and to perpetuate his name, he bequeathed to the Honorable John Richardson and James Reid of the city of Montreal, Esquires, the Reverend John Strachan, Rector of Cornwall in Upper Canada, and James Dunlop of the said city of Montreal, Esquire, and to their heirs a tract of land called Burnside, containing 46 acres including an acre of land purchased by him from the Sanscrainte, together with the dwelling house and other buildings thereon erected, with their appurtenances, in trust that they should by a good and sufficient conveyance and assurance, convey and assure the same to "The Royal Institution for the advancement of learning

constituted or to be constituted under an act of the Provincial Parliament of the 41st of His late Majesty, cap. 17, intituled "An act for the establishment of Free Schools and the advancement of learning in this province;"* upon condition that The Royal Institution, to use the words of the testator, "do and shall within the space of ten years to be accounted from the time of my decease, *erect and establish, or cause to be erected or established* upon the said last mentioned tract or parcel of land, an University or College, for the purposes of education and the advancement of learning in this Province, with a competent number of Professors and Teachers to render such establishment effectual and beneficial for the purposes intended; and if the said Royal Institution

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* After stating that His Majesty had been most graciously pleased to give directions for establishing a competent number of Free Schools for the instruction of the children of His Majesty's Subjects in this province, in the first rudiments of useful learning, and also as occasion might require, for foundations of a more enlarged and comprehensive nature; and that His Majesty had been further most graciously pleased to signify His Royal intention that a suitable proportion of the lands of the Crown, be set apart and the revenue thereof appropriated to such purposes.

The 1st section of this statute empowered the Governor of the province to appoint persons Trustees of the Schools of Royal foundation, and of all other Institutions of Royal foundation, to be thereafter established in this province for the advancement of learning, as also for the management of estates and property to be thereafter appropriated to the said Schools and Institutions, and to remove the said Trustees and to appoint others their successors, and successors to such as should die or resign their trust.

By the 2d section, the Trustees and their successors are declared to be body corporate and politic, by the name of "The Royal Institution for the advancement of Learning," and are authorized to receive, hold and purchase, without licence in mortmain, or *Letters d'Amortissement*, all messuages, lands, money, &c. to be given, granted, purchased, appropriated, devised or bequeathed in any manner or way whatever, for the said Schools, &c.

By the 3d section, the property of the said Schools and Institutions of Royal foundation is vested in the said Trustees and their successors.

By the 4th section the Governor is empowered to appoint the President of the Corporation, and other officers, &c.

The remaining sections of the statute relate to and provide for the establishment of Free Schools in the several country Parishes and in the townships of the said Province.

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“ for the advancement of learning should so erect and
 “ establish, or cause to be erected and established a
 “ University, then upon condition also, that *one of the*
 “ *Colleges* to be comprised in the said University
 “ should be named and perpetually be known and di
 “ tinguished by the appellation of *McGill College* ; and
 “ if the said Royal Institution for the advancement
 “ learning should not so erect and establish, or cause
 “ to be erected and established an University, but
 “ should erect and establish, or cause to be erected
 “ or established a College only, then, upon the further
 “ condition, that the said College should be named and
 “ perpetually be known and distinguished by the ap
 “ pellation of *McGill College*.” The testator further
 provided, that until such University or College should
 be erected, the said Royal Institution, to use the testa
 tor’s words, “ *shall permit my said wife, and in case of*
 “ *her death the said Francis Desrivieres, to hold, possess*
 “ and enjoy the said last mentioned dwelling house
 “ buildings and premises, and to recover, have and
 “ receive all and every the rents, issues and profits
 “ thereof, to and for her and his use and benefit. And
 “ upon this other and further express condition, that
 “ if the said Royal Institution for the advancement of
 “ learning should neglect to erect and establish, or
 “ cause to be erected and established, such University
 “ or College as aforesaid, *in manner aforesaid, within*
 “ *the said space of ten years, to be accounted from the*
 “ *time of my decease,*” then and in such case, the said
 conveyance to the Royal Institution, should, after the
 expiration of the said ten years, be absolutely void.
 And upon trust, that the Respondents (Plaintiffs in the
 Court below,) and the survivor of them should permit

the testator's widow, or in case of her death, the Appellant, to enjoy the said land, dwelling house and premises, and recover, have and receive the rents and profits thereof, until the making and executing of the said conveyance and assurance to the Royal Institution. And it is provided by the testator's will, that if the Royal Institution should refuse to accept the said conveyance and assurance upon the said conditions, or should, after the making and accepting of the said conveyance and assurance, "neglect to erect and establish, or cause to be erected and established such University or College as aforesaid, in manner aforesaid, within the said space of ten years to be accounted from the time of his decease; or if from any legal cause, matter or thing, the said trust so as aforesaid, to convey and assure the said tract or parcel of land and premises to the said Royal Institution for the advancement of learning, in the manner herein before directed, should be incapable of being accomplished or carried into effect, or otherwise become or be deemed or be construed to be invalid, illegal or inoperative, then and in either or any of those cases," upon trust, that the Respondents, or the survivors or survivor of them, or their heirs, &c. do and shall from and after the expiration of the said space of ten years, by a good and sufficient conveyance and assurance, convey the said tract of land and premises to the Appellant, if then living, and to his heirs and assigns for ever, or if dead, to his legal heirs then living and to their heirs and assigns for ever.

The testator further directs, that out of the rest of his estates, real and personal, which shall or may remain after satisfaction of all legacies, the sum of

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£10,000 shall be paid to the said John Richardson, James Reid, John Strachan and James Dunlop, the heirs, executors and curators, to and for the purposes and upon the condition following, that is upon trust that they “do and shall pay the said sum of £10,000 with the interest to accrue thereon, from and after three years from his decease, to the said Royal Institution for the advancement of learning, when and as soon as the said Royal Institution for the advancement of learning shall have erected and established or caused to be erected and established, a University or College, upon the last mentioned tract or parcel of land hereinafter directed to be conveyed to the said Royal Institution for the advancement of learning in manner aforesaid, to be, by the said Royal Institution for the advancement of learning, paid and applied towards defraying the expense incurred in erecting and establishing the said University or College and towards maintaining the same after it shall be erected and established in such manner and form, and under such regulations as the said Royal Institution for the advancement of learning shall, in this behalf prescribe: Provided always, that such University or College be erected and established within ten years to be accounted from the time of his death.” It goes on to provide, that if such College should not be erected within the space of ten years, then upon trust that the respondents, their survivors or survivor, their heirs, &c., from, and immediately after the expiration of the said ten years, do and shall pay over the said £10,000, with interest accruing thereupon, to the appellant, Desrivieres, if alive, to and for his use and benefit, or if dead, then to his legal heirs then living to their use and benefit.

the testator died on the 19th of December 1813. On 8th of October 1818, His Majesty, by his Letters patent under the great seal of the province, constituted and established the corporation referred to in the provincial statute 41st Geo. III. cap. 17, by the name of *the Royal Institution for the advancement of Learning* and on the 13th December 1819, other Letters patent passed the great seal, by which a President was appointed to the Royal Institution who was made an integral part of the same. The Royal Institution being thus created, His Majesty was graciously pleased, by Letters of Privy Seal, dated at Westminster the 31st of March, in the second year of his reign, to ordain and enact that upon the land and in the buildings described in the testator's will, "there shall be established, from this time one college, at the least, for the education of youth and students in the arts and faculties, to continue for ever, and that the first college to be erected thereon, shall be called *McGill College*," and His Majesty was also pleased therein to appoint certain colonial officers, to be, with the Principal elected by the same, governors of the said "*McGill College*;" and to declare that the same, and four professors, to be also elected, shall be a body politic and corporate in deed and in name, by the name and style of the *Governors, Principal and Fellows of McGill College*." In this action the plaintiffs, in the court below,—the respondents in this court,—trustees under McGill's will, sought to recover from the executors and residuary legatees the sum of £10,000 and interest. The appellant,—one of the defendants and who had this money in his hands,—intervened as residuary legatee, and prayed

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that this money might be declared to belong to him, the legacy having become lapsed.*

Plamondon for the appellant.—*Vallières de St. I.* and *Ogden* for the respondents.

KERR, Justice. This case comes before the court in such a shape that we are enabled to give a complete judgment on all the points, and as regards all the parties; and though it is not likely that the respondents

* Under the devise above mentioned, and a subsequent conveyance of the estate of Burnside,—by the devisees in trust, to the Royal Institution, the latter, after having obtained His Majesty's Royal Letters Patent erecting and establishing a College thereupon by the appellation of MCGILL COLLEGE, brought a petitory action, in the Court of King's Bench at Montreal, to obtain from the appellant the estate of Burnside, of which the following is a report :—

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING v. DESRIVIERES

1. If the declaration, in a petitory action, contain a designation of the land by name, that of the borough, village, or hamlet, and of the parish where it is situated, these will be sufficient even if the boundaries be incorrectly stated. But if the designation be so far imperfect, that the defendant cannot identify the land, he may plead this fact by an exception as to form.

2. Proof of a letter of attorney, executed *sous seing privé*, is not required where the deed executed by the attorney in virtue thereof is proved, if the principal, by any subsequent use he has made of the deed has ratified it.

3. The head of a corporation may bind the body corporate by any contract which it may derive a benefit.

4. A devise of real estate to a corporation upon condition that it should, within a period of ten years, erect and establish, or cause to be erected and established, upon the said estate, an university or college: Held, that the words *erect and establish, &c.* extend only to the erection and establishment of the corporation or body politic, forming a university or college, and not to the erection of a building in which the university or college is to be established.

5. To maintain a petitory action against a residuary legatee, a *delivrance de biens* from the heir at law, is not required, the Quebec Act and the Provincial Statute Geo. III. c. 4. § 1. having,—as respects testamentary donations, in cases where the donor is dead at law has been entirely excluded from the succession by will,—abrogated the rule of the French law, *Le mort saisit le vif*. *Semble* that the heir at law only can avail himself of the exception (if pleaded) that the plaintiff had never obtained *delivrance de biens* from the legatee.

6. A licence in mortmain under the declaration of the King of France of 1763 is not required to enable the Royal Institution for the advancement of learning to sue for a devise of real estate.

7. If a corporation, to be composed of certain trustees to be subsequently named by the Crown, be established by statute, the existence of the corporation will commence at the time when the statute was passed and not when the trustees are named.

8. The condition of a devise to the Royal Institution for the advancement of learning, that it should, within ten years, cause to be erected and established an university or college, bearing the testator's name, is accomplished, if an university of Royal foundation, be erected and established within that period.

In this action the plaintiffs claimed, all that tract or parcel of land commonly called Burnside, situated near the said city of Montreal, containing about forty-six acres, including one acre of land purchased by the testator.

appellant will both be disposed to acquiesce in our judgment, in whatever scale our opinion may be cast,

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one Sanscrainte, which said tract or parcel of land is contiguous to t. Antoine Suburbs of the said city of Montreal, and is bounded as ws, to wit, in the front thereof, by a street leading thereto called St. que-street, and in part by two lots of ground, the one belonging to Angus Esquire, and the other to Raymond Bellaire, on one side to the south by land belonging to the representatives of the late Simon McTavish, ire, and on the other to the north east by land belonging to James ill Desrivieres, Esquire, and in the rear to the north west, by land also ing to the said estate and succession of the said late Simon McTavish, ire, deceased, together with the dwelling house and other buildings on erected, with their appurtenances.

The defendant demurred to the declaration and assigned special causes of caption or demurrer, which having been overruled the defendant answered the merits. 1. That he did not detain the land in question from the al Institution in manner and form as declared. 2. That the allegations ained in the declaration were false, untrue and unfounded in law and in

the issues thus raised the parties proceeded to evidence. The will of ill, dated the 8th day of January 1811, was produced. It appeared the testator died on the 19th December, 1813, from which period his w possessed and enjoyed the estate of Burnside until her decease on 16th day of April, 1818, and from that time the defendant possessed and yed the same. On the 8th day of October, 1818, nearly five years after death of the testator, the then Governor-in-Chief, in conformity to the rincipal statute, 41st, Geo. III. c. 17. by an instrument under the Great of the Province appointed certain persons therein named, " Trustees of the Schools of Royal Foundation in this Province, and of all other institutions of Royal Foundation, to be thereafter established for the vancement of learning therein," and declared the said trustees and their essors a body corporate and politic by the name of " The Royal Institu- for the advancement of Learning." On the 13th day of December, 9, by two other instruments, under the Great Seal, an additional number trustees were appointed, the Lord Bishop of Quebec was named Principal he Institution, and times and places fixed for the meetings of the mem- s. On the 3rd day of August, 1820, by a notarial deed made and exe- ed at Montreal, the then surviving devisees, in pursuance of the trust osed in them, conveyed to the Royal Institution the estate of Burnside, ject to the conditions prescribed in the will. The Royal Institution ed by and through Stephen Sewell, specially authorized as their attorney. a clause in this deed it was stipulated that the Royal Institution should ept and ratify the same within two months from the date thereof. On 22nd day of August, 1820, at Montreal, the deed of conveyance was epted and ratified by an act passed before notaries, on which occasion the al Institution was represented by the Lord Bishop of Quebec, Princi- of the Institution. On the 31st day of March, 1821, Letters Patent re issued and granted, upon the petition of the Royal Institution, wherein devise in question is recited, and thereby His Majesty did will and grant, t upon the land of Burnside and in the buildings thereon erected or to erected, there should be established from that time *one college at the t for the education of youth to continue for ever, and that the first lege should be called McGill College, &c.* Previous to the granting of

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yet it becomes us to consider, and that maturely, whether the judgment of the court below, can or cannot

these Letters Patent a demand by notarial protest had been made by the Royal Institution, upon the defendant, to surrender and deliver up the possession of Burnside which he then refused to do. These documents were proved by authentic and certified copies. The procuration by the Royal Institution to Stephen Sewell was fyled, but of the seal of the corporation affixed thereto and of the signature of the principal of the Institution subscribed thereto no evidence was offered. There was annexed to the procuration, however, a written admission thereof as being that referred to in the deed of conveyance and signed by all the parties to the deed, including the notaries. The decease of the testator was duly proved, as also that of Dunlop, one of the devisees in trust, previous to the execution of the deed of conveyance. The possession of Burnside was also proved to be in the defendant. The defendant proved, that the description of the property as set forth in the declaration was inaccurate as respected the front, north east, and the boundaries.

The parties having been finally heard, the judgment of the court was delivered by

Pyke, *Justice*. This case is certainly one of importance whether we consider the value of the property in contest, the benevolent and public object to which that property was destined by the will of McGill, or the legal questions to which it has given rise. The court has judged it necessary to state as explicit as possible in declaring its opinion upon the several points submitted for consideration, anxious that the principles upon which its decision may be founded, should be clearly and distinctly understood, not only to those immediately interested, but by the profession at large; as several of the questions raised are of a general nature, the decision upon which will affect not only the present case, but many others which may hereafter be brought under the consideration of the court.

The four first clauses of the statute 41st, Geo. III. c. 17. appear to the court to be the basis upon which this action must stand or fall, and should be fully brought into view. (a) This law, worthy of the Legislature of Lower Canada, will, perhaps, be attended with more solid and beneficial effects than any other to be found in our statute book; and it is the more highly to be considered as it serves to record one of the numerous instances of the bounty of our late Sovereign to His subjects in Canada. The late McGill with this statute in view and a full knowledge of its provisions in the framing of which he, as a Member of the Legislature, had participated on the 8th January, 1811, made the devise in question; (b) in virtue of which and of a subsequent conveyance of the estate of Burnside by the devisees in trust to the Royal Institution, it is that the latter having obtained His Majesty's Letters Patent erecting and establishing a college upon the said estate by the name of McGill College has now brought the present petitory action.

1. The first objection taken by the defendant's counsel is, that the designation of the land in real actions must be certain and full; and it having been proved, on the part of the defendant, that the designation in the declaration is not correct, as to the front, rear and north east boundaries,—the land being not being sufficiently identified,—the action ought to be dismissed.

(a) See Ante, p. 219 in notis.

(b) See Ante, p. 218. et seq.

supported in law. The demand on the part of the trustees has been contested with great pertinaciousness,

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In support of this objection the ordinance of 1667. art. 3. tit. 9. has been cited, which requires, in real actions, that the property claimed should be fully described as to situation and extent, as also by its *tenans et aboutissans, à peine de nullité*. Now, the intention of this article was to put defendants in a situation to defend themselves, to the end, "*que le défendeur ne puisse ignorer pour quel héritage il est assigné*, and the nullity pronounced was but the *nullité relative* (a) which the courts were not bound to notice unless specially pleaded. If, therefore, the designation is so obscure and imperfect as to produce uncertainty a defendant is not bound to answer, but may avail himself of this article by a preliminary plea or a peremptory exception as to form: as, however, the class of pleas founded on *nullités relatives* was not much favored in the French courts, the article in question, when pleaded, was seldom rigidly enforced, and the result was not always the dismissal of the action, but the plaintiff was ordered to amend under no other penalty than the payment of costs. (b) But if the defendant pleaded to the merits he was considered in this, as in all other matters of form, to have waived the exception and to have tacitly admitted the sufficiency of the declaration. All the requisites of this article may not have been literally complied with, yet, if the designation of the land is so far explicit that the object could not be mistaken by the defendant, the spirit and intention of the rule having been complied with, the French courts never allowed the mere letter of any article of the ordinance to be used for the sole purpose of vexation or delay, or in support of bad faith. (c) It is, therefore, obvious, that the objection is not supported by the article relied on by the defendant. He has waived the benefit of it by not pleading it in the first instance as required by the practice of the court. It will be seen further upon reference to the declaration that it is so far conformable to the article as to afford no ground even for a preliminary plea. The property demanded is, in the first instance, correctly designated both by name, situation and superficial contents, and it is only in the subsequent part of the description, when the boundaries are given, that error is to be found. The plaintiff claims no more by his declaration than what was bequeathed, and the boundaries, in part erroneously stated, were not necessary for the support of the action and may be rejected as surplusage, for upon recourse to the article succeeding the one cited from the ordinance of 1667, it will be found to be as follows:—

"S'il est question du corps d'une terre ou métairie il suffira d'en désigner le nom ou la situation." This is an exception to the general rule and is thus explained by Jousse, "c'est à dire le nom de la terre, ou métairie, et celui du bourg, village, ou hameau, et de la paroisse où elle est située." (d) The court having all the facts of the case before it may reject the erroneous boundaries and may award to the plaintiff what may be substantially described and claimed, viz.; the estate of Burnside as bequeathed, containing about 46 acres of land. This objection we overrule, and it will remain for the court, should the plaintiff be entitled in this action, to give such judgment as the law and the facts of the case will warrant. The court cannot award more than has been claimed in the conclusions of the plaintiff,

(a) 1. Pigeau 161.

(b) 1. Jousse, tit. 9. art. 3.—Vide Rep. de Jur. v. Aboutissans and 1. Bornier

(c) 1 Pigeau 161.

(d) 1 Jousse, note 1. p. 108.

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and several points have been made in the argument both of the principal and cross demand.—1. That the

but it has the right not only to award or reject but also to modify the conclusions, “*Le juge peut rejeter, accorder, ou modifier les conclusions prises par les parties.*” (a)

2. It has been objected by the defendant, that the evidence on the part of the plaintiff is incomplete in this, that the Letter of Attorney under which Stephen Sewell accepted and signed the deed of conveyance from the devisees in trust to the Royal Institution, to which Letter a seal is affixed, has the following signature: “The Royal Institution for the advancement of Learning by J. Quebec, Principal of the said Royal Institution, &c.” because *sous seing privé*, the seal and signature thereto ought to have been proved. It might be a question whether the seal of the Royal Institution does or does not prove itself, (b) but it appears to the court that it is not requisite under the circumstances of this case that any decision should be now given upon that point, as we are of opinion that it is immaterial whether the Letter of Attorney has or has not been proved. It would be as preposterous in the present action to require from the plaintiff such proof of his own Letter of Attorney, as it would be in an ordinary case to call upon him for the proof of his own existence. It is sufficient that the Letter of Attorney is recognized by the Royal Institution in now calling on this court to confirm and enforce the deed executed under it by Mr. Sewell in its name, and a mere formal recognition could not be made. The deed is brought into court by the plaintiff, and if enforced it must be according to its tenor, with all its conditions, limitations and restrictions therein expressed. The persons making the conveyance, and others interested in the succession of the McGill are clearly bound by it, as being in strict conformity to his last will. The only party that could have a right to object to it is the Royal Institution who have admitted it to be their act, an admission that the defendant cannot, nor can this court gainsay. The point, however, does not merit rest here, for long before the institution of this action, on the 23rd day of August 1820, the defendant was notified at the request of the Royal Institution,—by notarial protest,—that the Institution was ready to receive possession of the property under the devise and subsequent conveyance made in its favor, and he was thereby required to deliver up the possession. This again, was a solemn and formal recognition of the deed, and consequently of the power given by the Institution to its Attorney to accept and sign the same. The principle of law is, that where there has been no special procuration “*ratihabitio mandato comparatur*,” (c),—and a tacit ratification is sufficient. The Royal Institution has, as far as in its power, actually performed all that by the deed it was bound to do, the highest possible ratification that could proceed from it. One of the conditions in the will was, that the Institution should erect and establish within ten years from the death of the testator, an university or college, upon the estate of Burnside. Now in Royal Letters Patent dated the 31st March 1821, erecting a college upon that estate to be called McGill College, we find the words recited in the following words: “And whereas we have been humbly petitioned by the said Royal Institution for the advancement of Learning that we would be pleased to grant our Royal Charter, &c. The Institution

(a) 4 Rep. de Jur. v. Conclure, 351. col. 2.

(b) Vide *Moises v. Thornton*, 8. T. R. 307. *Woodmass v. Mason*, 1. Esp. p. 53.

(c) *Poth. Obl. No. 75.*—

gacy is null as having been made in contravention of the Ordinance of 1743. 2. That no corporation was

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s, therefore, effectually proceeded to the performance of the conditions of the deed, and a more conclusive acceptance or ratification could not be made. After what has fallen from the court on this objection, it is needless to observe upon the *signature* to the Letter of Attorney, as it necessarily follows, that if proof of the seal is unnecessary, so that of the signature must also be unnecessary.

3. In the foregoing observations the court has not noticed the question raised by the defendant's Counsel, as to the validity of the act of ratification of the deed of conveyance executed by the Lord Bishop of Quebec, as Principal of the Royal Institution, no doubt, in consequence of the clause in the deed, that the Royal Institution should within two months from the date hereof accept and ratify the deed. It is said that the ratification is not valid, as the Lord Bishop in his quality of Principal of the Institution could not have executed it without a special authority from it, and that the act of ratification should have been under the corporate seal of the Institution. The court cannot but express surprise that such a clause was inserted in the deed, as it was executed under a very special and full procuration from the Royal Institution, and the deed of conveyance was complete without it, being in strict conformity to the power given. (a) The head of a corporation may bind the corporation by any contract from which it may derive a benefit, but not otherwise. (b) A more favorable case of this description probably cannot offer than the present is. We cannot presume that the Lord Bishop did not, in this matter, act under the authority of the corporation, though no special power has been produced. The subsequent use made of the deed by the corporation has made it their act, and operated as a tacit ratification, and the Institution has the right to claim the benefits resulting from the deed, as far as they may be found therein legally entitled, as they are bound to perform all and every the conditions and obligations imposed upon them by that deed.

4. It has been urged by the defendants' Counsel, that the Royal Institution cannot at present claim or take from the defendant the possession of the estate of Burnside, under the devise thereof in the will, inasmuch as the Institution hath not complied with the condition annexed to the said devise, by erecting and establishing, or causing to be erected and established, an university or college, upon the said estate, which it was bound to do within ten years from the death of the testator; until which erection and establishment, the Royal Institution is directed by the will to permit and suffer the wife of the testator, and in case of her death, the defendant, to possess the estate, and to receive the rents and profits thereof. The intention of the testator, which the court must always look to and enforce, was undoubtedly to bestow a certain portion of a very ample fortune acquired in this province, for the purposes of education and the advancement of learning therein; and it cannot be supposed, without insult to his memory, that he has annexed such a condition to the devise as to render it nugatory and of no avail. Now opposite constructions have been given by the parties to the words used in the conditions before noticed, namely, "*the erection and establishment of an university or college*;" the defendant, on the one hand, contending that these words imply the erection of a building in which the university or college is to be established; the plaintiff on the other hand,

(a) Vide 14 Rep. de Jur. v. Ratification. (b) Kyd on Corp. 312. 13.

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in existence, either at the time of making the will, or at the testator's death, and that having no capacity

contending that they extend only to the erection and establishment of a corporation, or body politic, forming the university or college, and which has been accomplished by the Royal Letters Patent filed in this cause, the former construction, given by the defendant, be correct, it is obvious that the main intention of the testator never can be carried into effect as long as the defendant, now in possession of Burnside, withholds that session from the Royal Institution; but if the latter construction be adopted, no impediment offers to the full and entire accomplishment of the intention of the testator. The court is therefore called upon to discharge a sacred duty, and,—placing itself in the situation of the testator when he made his will,—is bound to explain what has not been fully or clearly expressed therein, supply what may be necessary to complete the sense thereof, and declare and give full effect to that intention which may be otherwise manifest from the general tenor of the will. *Pothier* establishes the following fundamental rule, “Les dernières volontés sont susceptibles d’une interprétation large, et on doit principalement s’attacher à découvrir quelle a été la volonté du testateur;” and *Bourjon (b)* says, “Le juge du testament est censé être un second testateur qui développe ce que le testateur n’avait pas suffisamment développé. De ce principe général il s’en suit que si l’expression n’est pas parfaite, c’est au juge à suppléer ce qui manque, pour lui donner un sens parfait, lorsque ce supplément paraît conforme à l’intention du testateur; pour cela il doit se placer dans la situation que le testateur occupait lorsqu’il a fait son testament,” &c.

A testator can annex to a devise or bequest, any conditions he may think proper, and that are not contrary to good morals or any express prohibition of Law; and these conditions must be accomplished: his will is the Law, and must be observed and enforced. At the same time, if a condition be imposed, the accomplishment of which is impossible, the condition fails, and must be put out of consideration, that the main and obvious intention of the testator may not be defeated. *Bourjon (c)* establishes the principle, and says, “En effet, il paroît suffisamment par la disposition, que le testateur a voulu gratifier le légataire; ce qui doit avoir son effet, indépendamment de l’accomplissement de la condition, lorsqu’elle est impossible; autrement il faudroit supposer que la disposition est une dérision; ce qu’on ne peut pas faire.” It is for the Court, then, to give that construction to the will which, in its opinion, will effectually meet the benevolent views and intention of the testator; and we cannot but think that the construction contended for by the plaintiff is the most correct and reasonable, and that from the moment the Royal Letters Patent erecting and establishing a College, upon the estate of Burnside, by the name of McGill College, was made and issued, the Royal Institution had a right to enter upon the estate, and that of the defendant to possess the same under the will ceased. Indeed, if this be not the true construction, one part of the will would be in contradiction to, and destroy the other, which however cannot be allowed when the intention of the testator can be collected from the will, taken altogether, and that intention effectuated. *Pothier (d)* lays down this rule

(a) Traité des Donations Testamentaires vol. 7. ch. 7, sec. 1. p. 412.

(b) 2 Bourjon, 353.—Des Testamens, ch. 8, sec. 1, n 1, 2.

(c) Vol. 2, p. 363.—Des Testamens, part 5, sec. 3.

(d) Vol. 6, 4to ed. p. 414.

receive the legacy, it became lapsed. 3. That the erection of a material college, to be called "*McGill*

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observed in the interpretation of wills:—"Une disposition doit s'entendre plutôt dans le sens selon lequel elle peut avoir effet que dans le sens selon lequel elle ne pourrait en avoir aucun." And *Cochin* affirms it; he says, "Car quand une clause est susceptible de deux sens différens, il est de principe qu'il faut rejeter celui des deux sens qui est absurde, ou qui rendrait la disposition nulle, et caducque pour se référer à celui qui est juste et raisonnable en lui-même, et qui établit une disposition conforme aux loix. C'est ce que tous les docteurs nous enseignent; ils veulent que l'on entende les actes dans le sens qui en procure l'exécution, et non dans celui qui les anéantit." (a) Besides, if the condition attached to the devise, either in the whole or in part, be in itself impossible, it must be rejected, so that the will of the testator may not be defeated. It would have been otherwise if what was evidently an express and clear condition had not been accomplished, and that the ten years had elapsed, within which the University or College was to be erected and established, without any such erection or establishment. The limitation would, in that case, have operated fatally. But this period has not yet elapsed, nor can it be fairly charged with any effect urged on the part of the Defendant that negligence and improper delay have occurred; since the testator, anticipating that difficulties and delay might arise, has thought proper to allow the period of ten years for the accomplishment of that part of his will; and the delay has operated much to the advantage of the defendant, by leaving him in the enjoyment of a valuable estate, of the benefit of which it is to be regretted that any circumstance should have intervened hitherto to deprive the plaintiff.

In considering the will before us, and which evidently has been drawn by a professional character of ability, we are upon every fair principle led to ascribe the legal import of the words therein used. Now, the word "erect" is equally applicable to a Corporation as to a building: the erection of a Corporation is the language of the law, and a Corporation may exist without a building which may be necessary for its accommodation. "The King, it is said, may grant to the subject the power of erecting Corporations, though the contrary was formerly held. But it is really the King that erects, and the subject is the instrument." (b) "But with us in England the King's consent is absolutely necessary to the erection of any Corporation, and his consent is given either by Act of Parliament or Charter." (c)—Now, Universities and Colleges are one of the several species of Corporations noticed in the books, and consequently must be erected, as all other Corporations, either by Act of Parliament or Royal Charter; when, therefore, the condition of the devise requires the erection and establishment of a University or College, it does not mean a building, as contended for by the defendant, but a Corporation or body politic, which, however, must have a building for the purposes of that Corporation, though the Corporation can exist without it. If, indeed, the testator had declared that the possession of the defendant should continue until an University or College should be built upon the land of Burnside by the Royal Institution, the intention then would clearly have been what the defendant contends for; but it is not so expressed; and it may fairly be presumed, if such had been the intention, of an intelligent character, as the testator was, assisted by a professional gen-

(a) Vol. 4, pp. 406, 407.

(b) 1 Black. Com. 473.

(c) Ib. 471, 472.

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College," on the land of Burnside, within ten years after the testator's death, being a condition precedent to t

tleman, would have so worded the devise as to have conveyed that intention. Now the Royal Letters Patent erecting and establishing the University College, in conformity to the will, ordain, "that upon the said tract of land called Burnside, and in the buildings thereon erected or to be erected there shall be established from that time one College at least, to be called *McGill College*." What then remains, but that possession of the estate of Burnside should be given to the Royal Institution, to enable them to carry into effect, not only these Letters Patent, but the intention of the testator, as expressed in his will? It must be obvious that without this possession, the necessary buildings and accommodations cannot be made, nor provided, nor the Corporation of McGill College proceed to put into operation any of its powers, or organize itself in any manner whatever. Is it sufficient that the forms and conditions of the will, as far as it has been possible, and indeed required, have been complied with: a College or Corporation has been erected and established upon the estate of Burnside; and being done, the defendant, and now possessor of the estate, can no longer claim any enjoyment thereof under the will, but must surrender it to the Royal Institution, the condition of the devise being thus worded: "And upon condition, also, that until such University or College be erected and established, the said Royal Institution for the advancement of learning and shall permit and suffer my said wife, and in case of her death, my said François Desrivières, to hold possession and enjoy the said mortgaged tract or parcel of land, dwelling-house, buildings and premises, and to recover and receive all and every the rents, issues and profits thereof." It was observed in argument, by the defendant's Counsel, that the Institution should, in the first place, have asked for, and it would have obtained possession of a sufficient part of the said land to erect a building for the purposes of a College, until which erection it could not claim the possession of the whole estate; but we cannot discover upon what principle of law such an argument may be founded. If the Institution is not entitled to the actual possession of the whole, it has no right to any part; the estate devised is an entire thing, and the rights of the parties must be to the entire estate and not to any particular part thereof. It might easily be conceived with confusion and inconvenience, if not hostility, might be produced by such divided possession. The observation has, however, been sufficiently answered by shewing that the Institution is now entitled to full possession; and it is moreover evident that a College may be in complete operation in the buildings, now on the estate, as soon as the Institution shall have obtained possession thereof.

5. The main and principal objection, however, which has been raised against the defendant to the plaintiff's right to recover in the present action, is that the devisees in trust of the estate of Burnside had never, nor has the Royal Institution since, obtained from the heir at law of M^cGill, or from his executor in the absence of such heir, the delivery of the legacy [délivrance du legs]—a formality which, it is contended, was essentially necessary to vest the property in the devisees in trust, and subsequently in the Royal Institution, and give a right to the latter to the present action. It is, however, contended on the other side, that the formality heretofore required is not now necessary under the existing law of Canada. (a) In nearly

(a) Vide ante. p. 128.

legacy's attaching, and no such college having been effected within the said period, the legacy had become

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the provinces of France in which customary law prevailed, and which were distinguished from the others by the term *Pays coutumier*, and particularly the custom of Paris, the law recognized no other heir than the *héritier sang*, or natural heir, (a) and it was not in the power of a testator to terminate any other, or deprive such heir of the legitime or four-fifths (b) the *propres*, of which disposal by last will was expressly prohibited; hence came the maxim and rule of law, "*Le mort saisit le vif son hoir plus proche et habile à lui succéder*," (c) the effect of which was, that the possession of the ancestor was continued in the person of the natural heir, who, in contemplation of law, became seized, upon the death of the ancestor, of the general mass of his estate and succession, the object of which was to prevent a violation of the prohibition made in favor of the heir at law, to enable him to secure his legal rights, and to shew, if necessary, that the proportion of the property bequeathed exceeded that of which, by law, the testator had a right to dispose by will, to the prejudice of his heir at law; and the heir being so seized and possessed, it was necessary that all legatees under a last will should in the first instance, before they could take possession of, or exercise any right over the property devised or bequeathed, apply to the heir, and obtain from him, either by a suit at law or otherwise, what was termed, *délivrance du legs*, to vest in the legatees the property so devised and bequeathed to them. (d) Such certainly was the law of Canada until the passing of the Act of the 14th Geo. III. c. 83, commonly called the Quebec Act, (e) whereby the policy of the ancient law of France, in force in Canada, for the preservation of estates in families, became changed, and the articles of the custom of Paris, which restricted the disposal of property by last will, was abrogated, and an entire freedom given to the owners of property to dispose by will of the whole thereof, without reserve, even to the prejudice of the heir at law, should such owner see fit. As in the construction however of this Act, and as to the effect of the clause before cited, some difference of opinion arose, a declaratory Act was passed by the Provincial Parliament, (f) to explain and amend the former. Any doubt could be entertained under the first act, no difference of opinion can, under this last prevail, inasmuch as a full, clear and decided power is given to dispose by will of an entire estate, and to such person and persons as the owner may see fit, to the exclusion of the heir at law; and when this alone the heir cannot claim any *saisine* of the property of the succession, inasmuch as the right of the heir upon which that *saisine* was established, has, by force of the statutes before noticed, and by the will of the testator, been destroyed. It is evident from all the authorities that the consideration, which in customary France was had to the claims of blood and of course rather than to the disposal of property by last will, and the recognition of no other heir than the *héritier du sang*, gave rise to the maxim of *le mort saisit le vif*, and to the necessity of resorting to the heir for the delivery of the legacy; therefore where this maxim does not apply, we must conclude that the *demande en délivrance du legs* is not necessary; the reason of the maxim failing it can no longer operate and it becomes an useless and unnecessary formality having neither law nor reason to support it. Indeed it would

a) Dic de droit, 2d Vol. page 51.—Institution d'héritier.

b) 292 Art. Custom of Paris. (c) 518 Art. Custom of Paris.

d) See Pigeau, 1 vol. 63, 2 vol. 393, 394, and 398.

e) See ante. p. 103, in notis.

(f) 41 Geo. III. c. 4, sec. 1. lb.

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utterly defeated and determined. 4. That the object of the bequest, namely, the erection of the college with

be absurd to suppose that he could be called on for the delivery of the property which he never had any existing but only an expectant right and where he has been deprived of every claim he might, without the will, have had the succession of the testator; to what end then call upon the heir to deliver that over which he has no control and which would be rather a mortification than otherwise, and an insult to him whose ancestors had deemed unworthy to participate in his succession. (a) "L'Institution d'héritier n'ayant lieu par testament, tout legs, soit universel soit particulier, est sujet à délivrance," and from this authority we may conclude that the formality was not have been required in customary France had the right of nominating an heir been there allowed. Now it is evident that if by virtue of the statute before noticed the blood heir may, by last will, be excluded from the succession, the *Institution d'héritier* must in effect exist, in this country, as it did in the Roman Law, and as admitted in some few of the customary provinces, and in those provinces which were governed by the Roman Law (*pays du droit écrit*) now in those customs and provinces the "délivrance du legs" was not required, inasmuch as the testamentary heir and not the heir at law, became seized, upon the death of the testator; and in those customs which preserved the usage in regard to testamentary heirs, (*Institution d'héritier*) the maxim of *Le mort saisit le vif* was equally applied to the testamentary as to the heir at law, and consequently the "délivrance du legs" was not necessary to vest the succession in the testamentary heir. In the following authority (b) those customs and the principle now stated will be found. "Il y a au contraire d'autres coutumes qui ont conservé l'usage et le fait des Institutions Testamentaires celle de Bourdeaux, art 74, porte *Le mort saisit le vif en quelque manière qu'il succède, par testament ou sans testament*. Celle de Berry, tit. 19. art 28. s'exprime à peu près de même : *Le mort saisit le vif son plus prochain héritier habile à lui succéder ab intestat ou aussi son héritier testamentaire*. La coutume du Duché de Bourgogne, c. 1. art. 4. dit, que : *si le testateur dispose de deux parts de ses biens.....en deux parts, ceux qu'il aura institués héritiers par son testament valablement et selon raison*. Celle du Comté de Bourgogne, chap. 3. art. 1, n'est pas moins précise : *Le mort saisit le vif, son héritier testamentaire institué par testament solennel ou nuncupatif*." Also in the *Dictionnaire de droit*, 2 vol. tit. *Institution d'héritier*—"c'est aussi une question si l'héritier testamentaire est saisi; dans quelques coutumes où l'institution de l'héritier a lieu, il est saisi comme celle du Duché, et du Comté de Bourgogne, de Burg et de Bourdeaux." It is, therefore, clear, that in these customs the testamentary heir was seized, without the necessity of a "demande en délivrance de legs," upon the heir at law, inasmuch as the maxim of *Le mort saisit le vif* equally operated as to both and which maxim alone could render necessary such a formality. "La nécessité de la demande en délivrance de legs soit universel soit particuliers, est fondée en pays coutumiers sur ce qu'en vertu de la maxime, le mort saisit le vif, les héritiers du sang sont saisis de plein droit de tous les biens de la succession à l'instant de la mort du défunt." (c) If then the existing law of Canada gives a power to the owner to dispose by will of the whole of his estate, it necessarily follows that he has a power to

(a) 2. Bourjon, p. 329.

(b) Rep. de Jur. 2. Institution d'héritier. 309. col. 2.

(c) L. C. Den. v. Delivrance de Legs, 161. sec. 1. § 2.

the period prescribed in the will, having become inoperative, the appellant was entitled to retain the £10,000, as the special and substituted legatee under the will.

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to nominate an heir to the exclusion of the natural heir or *héritier du sang*, it is an effect giving the power to a testator to do that which, as well in the Roman Law as in certain Provinces of France was allowed and called *Institution d'héritier*, and this without observance of the forms which by these laws were required in the exercise of that power. Now, in the case before us, the whole of the testator's property has, by his will, been devised to different persons and for various purposes, and if any heirs exist they are completely excluded, having no portion of the general mass reserved to them. To be seized of any property there must be an existing right to some extent other, in or over that property. Here the heir has none, and it would be a perversion of common sense and consequently of law to recognize in him any *saisine* in the property composing the succession of the testator. In the custom of Paris the power of nominating an heir, or the Institution *héritier*, by last will, was not recognized, the *héritier du sang* alone was considered the heir, and those claiming under a will were called legatees, but with that title the former had something to support it, he was substantially and legally the heir, as the "legitime" reserved to him by the custom could not be diminished by the will of his ancestor. "Une hérédité se détermine de deux manières, par la volonté de l'homme et par la disposition de la loi." (a). Now, by the statutes before cited, an entire freedom of disposing by last will of the whole of the property of the testator is given without restriction or limitation, it therefore necessarily follows, that the power so given must be complete and free in its execution and the will must alone be considered the law to be observed in the disposal and distribution of the testator's property. It precludes the necessity of resorting to any other, or that disposal which the law has provided in respect to intestate estates. The legal succession must give way to the testamentary, and the property must receive its destination "par la volonté de l'homme," and not "par la disposition de la loi." By the statutes then, a power is given to testators to an extent which was not known in the Roman Law, or in that of France, (except in the early period of the former) or in those Provinces of France where the Institution d'héritier was allowed, and if so the restrictions imposed by the ancient law of Canada, in regard to the disposal of property by last will, must be considered as entirely removed, and there must be also an exemption from those formalities which were observed and required where the Institution d'héritier was allowed. Now, where this last existed, it has been shewn that the "délivrance du legs" by the heir at law was not required inasmuch as the testamentary heir and not the heir at law became seized upon the death of the testator, and if a more extensive power and freedom than the above respects exist in this province, a greater freedom and less restriction must exist in the execution; particularly in regard to this succession where the heirs at law, if any there be, have been by will excluded from any share thereof, and which exclusion is authorized by law. It is not necessary to give any opinion as to the change which has thus been made of the ancient law of Canada, or whether the same was wise or otherwise, it is sufficient to say that the consideration for and favour shewn to the *héritier du sang*, by the ancient law, has ceased to prevail, and the consideration to the

(a) 9 Repertoire v. Institution, p. 507

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As to the first ground of objection, whatever may have been the effect of the Ordinance of the French

claims of blood and nature must be left to the discretion of the testator whose will disposing of his property is now and must be alone the law to govern this court and all persons concerned in the testator's estate in relation to the disposal of the whole thereof. Notwithstanding, however, the spirit of the ancient law of France to favor the heirs at law, *héritiers du sang*, thereby preserve estates in families, yet it was not so unjust as to withhold from the testator the power of disinherit the legal heir, for certain and necessary causes, such as unnatural conduct and cruelty on the part of such heir, in which case the exheredation had the effect to deprive the heir of the *saisine* given him by the 318th article of the custom of Paris. The existing law gives this power to disinherit in a more ample manner by giving an entire and uncontrolled liberty to dispose by will, and it is not necessary that the intention to exclude should be particularly expressed, or cause assigned for it, as all is left to the sole discretion and will of the testator; it is sufficient if by the will, it appear, that he has disposed of his property in favor of persons not his heirs at law. *L'exhérédation fait cesser la règle contenue en cet article (Le mort saisit le vif, &c.) de même que la renonciation aux successions des père et mère, qui se font par les filles au leur contrat de mariage. (a)* It must not be concluded from any thing that has fallen from the court that it considers the maxim or article of the custom *Le mort saisit le vif*, &c. as now entirely without effect in Canada, but only to except from its operation those cases where a disposal by last will and testament has been made to the entire exclusion of the legal or blood heirs. We are called upon to decide only the case before us and not upon a general principle which may be differently circumstanced and to which the reasons given in support of the present judgment may not altogether apply.

The court was not disposed to withhold its opinion upon this important point raised in argument, and so much insisted and relied upon by the defendant's Counsel, though it was not perhaps essential to have gone into the question so far as we have done, for it does not appear to us that the objection, under all the circumstances of this case, could correctly be urged on the part of the defendant, or that he could under the ancient law have availed himself thereof, and it is to be observed, that he has not made out a special ground of exception, and not directly put the question in issue; there is a more substantial ground, the defendant is not the heir at law.

(a) 4. Gr. Cout. 765. Som. § 8. n. 1.

Duclos v. Duront — This was an action by an universal legatee against a debtor of the testator, to recover the arrears of a *rente constituée*.

Plea, That the plaintiff never obtained *délivrance de son legs*. — **PER CURIAM**, — The defendant is a debtor of the testator, and the plaintiff, the legatee of all his estate. The plaintiff also was the executor of his will by which he the testator formally vested himself of the whole of his property, and vested the whole in the plaintiff. As executor, therefore, the plaintiff became seized of all the moveable property of the testator, and entitled to put himself into possession, which he has done. The executorship is finished. There is no necessity, therefore, to prove a *délivrance de legs*. He is not in possession by his own authority but with the consent and under the act of the testator. 10. *Rep. de Jur.* 66. col. 2. 1 *Arrêts Mod. v. Legs* No. p. 582. But independent of these facts the want of a *délivrance de legs* is an exception in the mouth of the heir, and not of a third person such as the defendant, "parce que" says the *Repertoire* "on ne doit pas être admis à exciper du droit d'un tiers." *Vol.* 10. p. 68. Col. 1. vide 5 *Toullier* 530. Nos. 572-3. of *Donations et Testaments* lib. 3. tit. 2. c. 5. upon these grounds the exception must be dismissed. Judgment for the plaintiff, B. R. Q. 1820. No. 495.

ing of the year 1743, the Provincial statute of the
t of His late Majesty, granted full power to the Go-

the testator, and consequently has no right but what he has acquired un-
the will; he also is a legatee, and if the law he invokes is now that of
ada, it must operate against him, as well as all the other legatees, and
possession of the estate of Burnside must be declared an illegal one, but
cannot be allowed thus to destroy the title of the plaintiff by the destruc-
of his own, nor do we suppose he is very desirous of doing so, and as
possession which he now has of the estate of Burnside, is most clearly
ved from the will,—for without it he has not a shadow of title,—it must
resumed that he has legally obtained the delivery of it from the heir
curator, or from the devisees in trust under the will; if from the for-
it is undoubtedly under the will he has received it, and the right given,
ormality required by the ancient law, has been exercised and complied
n, and not necessary to be repeated; and if from the latter, in conformi-
with the will, the defendant's possession is that of the devisees, who be-
once in possession the “demande en délivrance” would not be necessary
ad third persons subsequently coming into possession thereof, and the
would be left to exercise his right, but as the case stands before us,
must presume that the possession of the defendant has been obtained
in the devisees in trust, as such was the direction of the will, under
uch alone he could hold the possession, and which he cannot now con-
ne to hold contrary to the terms of the will, which is his only title; he
not then the tiers détenteur inasmuch as he has no possession but by
sufferance and permission of the trustees in conformity to the will. If
eed the defendant had set up a counter title to the property, the fair and
al presumption which must now exist, would have ceased, but no attempt
his kind has been made, and of course he has none to produce, his pos-
sion was in the origin that of the devisees in trust, subsequently that
the Royal Institution, and he cannot avail himself of his now possession
contest the title of the plaintiff upon the ground that they, who we must
esume put him in possession had not legally obtained a surrender of it
m the heir at law, of the testator. *Illud à veteribus præceptum est, nemi-
n sibi ipsum causam possessionis mutare posse*; “celui qui a la possession,
même la rue détention d'une chose, non plus que ses héritiers, par une
ple destination, ni par quelque laps de temps que ce soit, ne peut changer
cause ni les qualités de sa possession ou détention, tant qu'il parait aucun
re d'acquisition.” (a)

6. It has been urged that by the declaration of the King of France in
43, (b) enregistered in this country, the bequest of McGill was a nullity,
ing contrary to the provisions of the declaration, and perhaps it might
ve been so considered if the Provincial statute of the 41st Geo. III. cap.
, had not preceded the bequest, and the bequest had not been made in
nformity, and with a view, to that statute. It is not necessary now, par-
cularly, to notice the prohibitions which that declaration contains, the
irit and intention of which was not to benefit heirs, but upon sound prin-
ples of public policy to prevent the establishment of corporations without
e express and particular permission of the Sovereign, and also to prevent
corporations legally established, from obtaining too much favor and influ-
ce by extensive acquisitions beyond the object of their creation. It will

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(a) Poth. Possession, Nos. 31. 35.

(b) 1 Edits et Ordonnances, p. 537.

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vernor, by an Instrument under the great seal of the Province, to establish free schools for the advancement

be found that the same policy prevails in the law of England, for there corporation can exist without the consent of the Sovereign; and corporations are restricted in their acquisitions. But this declaration of 1743, cannot be brought to bear upon a case which stands upon its own peculiar law. The Provincial statute of the 41st Geo. III. with a view to provide in the most extensive and liberal manner for the education of the rising generation in Canada, has erected the corporation of the Royal Institution, to which the bequest in question has been *since* made, and in the 2d section has declared that the said Institution should be capable in law, to "purchase, take, have, hold, receive, enjoy, possess and retain, without licence in mortmain, all messuages, lands, tenements and immoveable property, moveable goods, chattels and moveable property which hereafter shall be paid, given, granted, purchased, appropriated, *devised* or bequeathed in any manner or way whatsoever, for and in favor of the said *Schools and Institutions of Royal foundation.*" This statute which has received the sanction and approbation of our Sovereign, is of greater and higher authority than the declaration relied on by the defendant, and has evidently repealed or destroyed the effect of the latter, so far as concerns the corporation of the Royal Institution created by the statute. The testator therefore, so far from violating the law has contributed his mite, to forward the enlightened and liberal views of the Legislator, towards the youth of Canada, and nothing remains but to give effect to the bountiful bequest of McGill, that his memory may be respected as it deservedly ought by all classes of His Majesty's subjects in this province. If this had been a case of a corporation erected by Royal Letters Patent alone, the declaration of 1743, might then have been resorted to with more effect by the defendant, for although the King, by prerogative, can erect a corporation, yet he cannot give it forms and privileges contrary to the general law of the land. (a) To obtain these powers, privileges, or to be exempted from general restrictions, recourse must be had to the aid of an act of Parliament, that aid has been obtained in regard to the corporation of the Royal Institution, whereby it has been authorized to take and receive without limitation or restriction, all real and personal property which should, after the passing of the act, be devised or bequeathed to, and in favor of Schools and Institutions of Royal foundation. The law must consequently give place to the new, which last being beneficial to the public, must be expounded liberally and without restriction.

7. It has been further contended that the the Corporation of the Royal Institution had no legal existence at the period of the devise of the testator and on that account the bequest by him made became null and void. This is evidently one of those objections which, if founded, is in direct opposition to, and necessarily defeats, the manifest intention of the testator, as expressed in his will, and deprives the public of his bounty, the devisees trust named in the will being directed to convey the estate of Burnside to the Royal Institution *established or to be hereafter established*; the meaning of which must be, that if at the time the bequest was made the Royal Institution could not then be considered as established, the conveyance was to be made whenever it should thereafter be established. It may be admitted that if by a will an *immediate* devise is made to a Corporation not in ex-

(a) Kyd on Corporations, 6.

arning, and declared that the trustees and their successors, to be named as therein directed, shall be a body

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it will be void, as there is no such corporate body to receive, and it be equally void even if the Corporation were afterwards created, but some special and express law to take the case out of the general rule; but in the present case there can be no doubt that the Corporation of the Royal Institution was created by the Statute of the 41st Geo. III. The words of the 4th clause are, "The said Corporation hereby erected," nothing remained but that the Crown should nominate the trustees and members thereof, the consent of the Crown to the erection of the Corporation was evinced by the Royal sanction given to the Statute; and it was, moreover, erected before the testator made his will, though not complete operation until the subsequent nomination of the trustees or members thereof. It must be allowed that the powers of Parliament are unlimited, the making of new laws and abrogating or modifying old ones. Now, the second section of the Statute, it is enacted, that the Royal Institution shall take, have and enjoy, *without licence in mortmain*, all lands, money and which thereafter should be devised or bequeathed, in any manner or whatsoever to and in favor of the said schools and institutions of royal education, to and for the purposes of education and the advancement of learning. And by the third section of the Statute, it is further enacted, that all property which should thereafter be devised or bequeathed, in any manner or way whatsoever, for and in favor of the said schools and institutions for the purposes of education, &c. should be, and the same was thereby vested in the trustees of the Royal Institution. Subsequently to this Statute, the will of McGill, a bequest is made of the estate of Burnside to certain persons therein named, in trust, to convey the same nominally to the Royal Institution, but in effect to and in favor of one of the objects contemplated by the Statute; and it was not necessary that the trustees or members of the Royal Institution should have been nominated at the time of the death of the testator to give effect to this bequest, inasmuch as it was not necessary under the Statute, that the Royal Institution should have been named in the will, as the bequest, coming within the description of those mentioned in the Statute, would become vested in that Institution by the effect and operation of the Statute alone, inasmuch as the word *hereafter*, used in both clauses before alluded to, necessarily implies all devises and bequests from and after the passing of the Statute; it would, however, have been otherwise if, in lieu of the word *hereafter*, the following words had been used: "From and after the nomination of the said trustees or members of the said Royal Institution." The bequest, therefore, is not a nullity on account now contended on the part of the defendant, inasmuch as it is supported and authorized by the Statute, and the will of the testator can be reconciled with. Having, then, the support of the Statute and the sanction of the Crown, the case becomes a stronger one in favor of the Plaintiff, and for a legitimate, beneficial and general public object a bequest is made, in this case, to devisees in trust, persons in being and capable of recovering, and it does not lapse, as in the case of a devise to a Corporation not having any legal existence.

It has been also contended on the part of the defendant, that the Letters Patent filed, having established a College of Royal foundation, the conditions of the devise and bequest and the intention of the testator have not thereby been complied with, and the intention of the testator conformed to, inasmuch as the testator's will,—it is said,—provides for a college of private

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corporate and politic, by the name of "*The Royal Institution for the advancement of Learning.*" This p

foundation. In deciding upon this point the Court must be, as it been in regard to others, governed by the intentions of the testator expressed in his will. There can be no doubt that the testator, in life time, might, if he had thought fit, have applied for, and the King in virtue of his prerogative might have granted to him a licence to erect a corporation or college, and to endow it with possessions or revenues; in which case the donor would have been considered in law, the founder; this does not appear by the will to have been the object of the testator from the whole tenor of the bequest, he evidently contemplated a college, *Royal foundation*, whatever merit he might,—and to which he was so justly entitled,—from his very liberal bequest, with the additional honor of having one of the colleges distinguished by his name. By the Provincial statute of the 41st Geo. III. before noticed, a corporation was established under the name of The Royal Institution for the advancement of Learning, to be composed of certain persons to be named by the Governor, &c., to be trustees of the schools of *Royal foundation* in this province, and of all other Institutions of *Royal foundation* to be thereafter established for the advancement of learning. The corporation of the Royal Institution was, therefore, of *Royal foundation*, and its powers and duties extended only to Schools and Institutions of *Royal foundation* for the superintendence and management of which it was alone created, and to which it must necessarily be confined, having no power beyond these under the statute of incorporation. The testator with a perfect knowledge of the statute, by his will gives and devises his estate of Burnside to certain devisees in trust to convey the same to the Royal Institution, constituted and established under and in virtue of an act of Parliament, upon condition that the said Institution should erect and establish, or cause to be erected and established an university or college upon the said estate. Now such university or college could only be, under the statute, one of *Royal foundation*, and this must have been contemplated by the testator, who has referred to that statute, constituting and establishing the Royal Institution, and fixing its powers and authorities; and it is, therefore, obvious that he intended that a Royal College should be established under the authority of the statute, and his bequest in effect amounted to no more than this,—if the Royal Institution, sanctioned by my Sovereign, will establish or cause to be established an university or college on the estate of Burnside, to forward the views of the Provincial Parliament, expressed in the statute of the 41st Geo. III. I will give that estate and £10,000 towards that object. The testator then is in truth, the benefactor, but not the founder, a suggestor of a particular object of the general system of education provided by the statute, to the execution of which he was desirous to contribute, and has given a very liberal proportion of his fortune. It cannot take any thing from the merit of the testator if he should not be considered the first donor or benefactor to the Institutions for the advancement of learning, or that in this respect he should have been preceded by his Sovereign, who, as it is expressed in the preamble of the statute, has been graciously pleased to signify his Royal intentions that a suitable proportion of the lands of the Crown should be set apart, and the revenues thereof appropriated to such purposes. In private foundations the funds appropriated are sufficiently ample for the support thereof; but this is not the case in the present instance, for it is obvious, liberal as the donation is, that

on of the statute by giving such licence to the governor, completely does away with the ancient law in this respect, and renders this ground of objection unavailable.

The second ground of objection is also untenable, though it is admitted that a legacy is lapsed (*i. e. uque*,) when left to an individual, or to a body politic corporate, not *in esse*, yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution so soon that should please the Provincial government to give 'airy nothing a local habitation and a name.' This mode of settlement, by appointing trustees to preserve contingent remainders was devised by Sir *Orlando Idgman*, and other eminent lawyers, during the time of the civil wars in England, after the death of Charles

and was so considered by the testator, insufficient to provide for the education of the university or college, and the support of such an establishment. Being the case, independent of the considerations before stated, the principle of law is, that if the King and a common person give possessions to a corporation at the same time on its original creation, the King (*a*) by his prerogative shall be the founder. Many reasons might be offered to shew that the view now taken, was that of the testator, and it cannot but produce a higher tribute to his memory from the consideration that he should have adopted such wise and effectual measures to secure to the inhabitants of the province, the benefit he intended them by placing it under the secure fostering protection of a liberal and enlightened government, which can be but one ruling principle, the real welfare and prosperity of its subjects, not leaving it in that precarious state, where from private interest, the object intended might be defeated. It has been said that the college in question was an individual object unconnected with the general system, but on every consideration, and bound as we are to give a faithful interpretation to the will of McGill, we feel ourselves justified in saying that it was only to effectuate part of a general plan which had been preconceived and provided for by the Legislature, and cannot be separated therefrom without destroying the very foundation and root of the bequest—rendering it a nullity and defeating the manifest intentions of the testator.

Judgment for the plaintiff.*

*) Kyd on Corporations, 2 vol. p. 51.

This judgment rendered in the court of King's Bench at Montreal on the 19th of October 1822, was affirmed in the Provincial Court of Appeals on the 20th of November 1823; and before His Majesty in his Privy Council on the 7th of May, 1828.

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the first, and these gentlemen maintained and enforced it after the restoration, from which period it has been the prevailing mode of conveyance. It was too expedient the testator resorted, to carry his will into effect, and it would ill accord either with the principles of French or of English law were this court to lay down a rule which would defeat his intentions plainly manifested in his will by the words "constituted to be constituted." But this mode of settlement was perhaps unnecessary to give effect to the bequest, for it was a rule of law, recognized and confirmed in the case of Sutton's Hospital, that "a thing which is not in but in apparent expectancy, is regarded in law;" and the erection of free schools, under the licence granted by the 41st Geo. III. was a measure of which it was then an apparent expectancy.

The third ground of objection requires a more minute examination, as holding a specious ground of defence;—and in order to give full effect to the answer to this objection, it is proper to refer to the words of the writ of privy seal, dated the 1st March 1827, which His Majesty ordains and grants, that upon the "land and in the buildings," described in the testator's will, "there shall be established from this time one college at the least, for the education of youth and students in the arts and faculties, to continue for ever, and that the first college to be erected thereon shall be called McGill College." The legal effect of these Letters Patent was to convert the buildings and land appertaining to them into McGill College in intendment, which (in the quaint language of Lord Coke,) is all that suffices. The college was thereby called into a corporate and legal existence, and all the benefits and advantages

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emplated by the testator in making his bequest of this money, attached to it in as great a degree as if the fabric had been originally raised and fitted up for the purpose of a seminary for the education of youth. This principle was laid down in the case of Bridewell's Hospital in Queen Elizabeth's reign; nor was it then a principle newly received, for so early as the reign of Henry the Fifth, it was held that "a void place or soil in which a house is intended to be built, may, by the King's Charter, be named a house; and this nominative house shall be sufficient, as there it was, to support the name of an incorporation." In Camden's Britannia, 311, it is shewn, (says Lord Coke, in the case of Sutton's Hospital,) "that a void place, to support the name of a Corporation, may, by the King's Charter, be named an Hospital or Temple; and it is not requisite that there be always truth in the name of the incorporation, either of an hospital or of any other body politic." There is a variety of instances referred to in the same report, as that of the Knights Templars of St. John of Jerusalem, and the Savoy Hospital, in which, though neither the fabric of the temple or hospital was founded and built, yet the King's *intendment*, so expressed in the Charter, created a body politic and corporate.

The fourth ground of objection, that the object of the bequest, namely the erection of the College within the ten years prescribed in the will, having become impossible, the appellant is entitled to retain the £10,000. This is disposed of in the answer to the third objection. But if any doubts could be entertained that His Majesty's Charter alone did not virtually give an existence to *McGill's College* as a body politic capable of

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receiving this bequest, this is an objection which is more ungracious as coming from the lips of one who after having participated so largely in the bounty of the testator, is himself the guilty cause that an edifice has not been actually founded and built on the land of Burnside. To him who has wrongfully detained the property, the maxim of law cited at the bar, "*In omnibus causis pro facto accipitur id, in quo per alium non fit, quo minus fiat,*" applies with great force. The Royal Institution having done *quantum in illa fuit* to raise an edifice in stone, and having been prevented from building it by the refusal of the appellant to give them possession of the land, the Respondents are by law, placed in the precise situation they would have stood had they literally carried into effect the Testator's will, and erected the walls and fitted up the building for the reception and accommodation of scholars.

There were other grounds of defence urged in Court below, such as, the Royal Institution on its original creation had no head, and that there was no Royal licence to take in mortmain; but these are all unavailing, inasmuch as the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries without a head, and the governors of Sutton's Hospital have no president or superior, but are all equal in authority; so were, at least, the greater number of Corporations. As to a licence in mortmain, if to the Royal Institution, whenever it should be created, an express licence had not been granted by the 41st Geo. III. and the power had not been given to the Corporation, in the Charter, to take and receive moveable and immoveable property in mortmain, still the Royal Grant of the

st March, 1821, erecting "*McGill College*" into a body politic, having recited the bequest of the late Mr. McGill as the cause moving His Majesty to grant the Charter of Incorporation, must be held equivalent to an express licence to take and receive in mortmain; and besides, it may be observed, that the statutes of mortmain (which are a part of the public law of the province) make no mention of personal property, and therefore the powers of Corporations aggregate in general to take such property remains unlimited.

On every ground, the Court is of opinion that the judgment of the Court below ought to be confirmed, and it is confirmed accordingly; awarding to the Respondents the sum demanded, with costs.

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IN THE CASE OF JOSEPH FISHER.

20th June,
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JOSEPH FISHER, an alien, came lately into this province, where he was arrested about the 10th of May last, at the suit of one John Wood, a merchant in the State of New Hampshire, for a debt of £160, and was thereupon detained in the gaol of this District. On the 28th of the same month, two warrants, signed by a Police Magistrate, were lodged with the keeper of the same gaol, the one charging the said Joseph Fisher, as late of Vermont, gentleman, of "being accused on oath with having feloniously stolen, taken,

The Executive Government may deliver up to a Foreign State, for trial, any fugitive from justice charged with having committed any crime within its jurisdiction.

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“ and carried away from a trunk previously locked
 “ bank notes, to the amount of 638 dollars, the proper
 “ ty of John Wood ;” and directing the detention of the
 said Joseph Fisher, in the said gaol, to be dealt with
 according to law. The other warrant being somewhat
 more extended and precise, stating, “ that whereas
 “ Joseph Fisher, late of Vermont, gentleman, an alien
 “ to wit, a Prussian, now in confinement, under civil
 “ process, in the said gaol, stands charged upon oath
 “ with having, at Middlebury in the State of Ver-
 “ mont, feloniously stolen, taken, and carried away
 “ from a trunk, previously locked, bank notes, to the
 “ amount of 638 dollars, and to the number of 240
 “ the property of John Wood, of Keene in the State
 “ of New Hampshire, and with having, immediately
 “ upon the commission of the said felony, come into
 “ this Province,” and directing also the detention of
 the said Joseph Fisher, to be dealt with according to
 law. These warrants were founded on two depositions
 made by the said John Wood, on the said 28th of May
 last, in one of which the stealing of the bank bills or
 notes, to the amount of 638 dollars, is mentioned, but
 without stating the time or place where the felony was
 committed, and that the said John Wood verily be-
 lieved the said felony to have been committed by the
 said Joseph Fisher ; but in the other it was sworn
 “ that the said Joseph Fisher committed the crime and
 “ felony charged in the affidavit aforesaid, at Middle-
 “ bury in the State of Vermont ; that the said Joseph
 “ Fisher is not an English subject, but an alien, to wit
 “ a Prussian, as declared by him the said Joseph
 “ Fisher, and came into this Province from the State
 “ of Vermont aforesaid, immediately after the commis-

sion of the aforesaid offence." It further appeared at the offence, so charged against the said Joseph Fisher, is a felony and a crime punishable by the laws of the State of Vermont. On the 30th day of the month of May last, a warrant was issued in the name of our Sovereign Lord the King, tested in the name of, and signed by His Excellency the Earl of Dalhousie, the Governor in Chief of the province, addressed to the Sheriff of the district of Montreal, which is as follows:

" *Whereas* Joseph Fisher, late of the town of Middlebury, in the county of Addison, in the State of Vermont, one of the United States of America, gentleman, now committed and detained in our common goal in our said district of Montreal, under your custody, upon and by reason of a certain charge on oath of felony, to wit, upon the charge on oath of having on the twenty-third day of April, 1827, at the said town of Middlebury, in the county of Addison, in the State of Vermont, one of the United States of America, feloniously stolen and carried away divers, to wit, 240 bank notes for the payment of divers sums of money, the whole amounting to 638 dollars, of the value of 143 11s. sterling money of Great Britain, and then and there being the property of one John Wood. And whereas the said Joseph Fisher, not being one of our subjects, but being an alien, to wit, a Prussian, has since the commission of the said offence, come into this province from the said United States of America, and the said offence whereof he is charged as aforesaid, having been committed within the jurisdiction of the said State of Vermont, it is fit and expedient that the said Joseph Fisher be made amenable to the laws of the said State of Vermont, for the offence aforesaid.

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We, therefore, command you, that the body of the said Joseph Fisher, under your custody as aforesaid, you do immediately convey and deliver to such person or persons, as according to the laws of the said state of Vermont may be lawfully authorized to receive the same, at some convenient place on the confines of this province and of the said state of Vermont to the end that the said Joseph Fisher may be then safely conveyed by such person or persons as aforesaid to the town of Middlebury aforesaid, and there made to answer for the offence aforesaid, according to the laws of the state of Vermont. Provided always that the said Joseph Fisher be detained under your custody aforesaid for no cause, matter or thing, other than the offence aforesaid; and this you are not to omit at your peril."

Under these circumstances an application was made for a writ of *Habeas Corpus* which was allowed, and upon the return it appeared that the applicant, Joseph Fisher, was in the custody of a sheriff's officer, who was about executing the warrant directed to the Sheriff

Viger and Grant for the applicant.—*The Solicitor General (Ogden,)* contra.

REID, CH. J. Several questions have been raised and objections taken on the part of the prisoner, as to the sufficiency and legality of the proceeding against him. These we shall now consider. It is objected,—1. that there is no clear and positive charge of any felony or crime having been committed by the prisoner; the charge against him amounting merely to a suspicion, the grounds or causes of which are not set out, so as to enable the court to judge how far they are reasonable and sufficient. It cannot be supposed that much stress w

ant to be laid upon this objection, as in the affidavit John Wood there is a positive charge against the prisoner, *that he committed the felony in question at Midbury in the state of Vermont*, and so expressed in the warrant of commitment. It was no doubt necessary that the charge against the prisoner should be sufficiently clear and positive to render him amenable to the laws of that country he is stated to have violated, for this constitutes the ground-work of the whole proceeding. The court, however, thinks the accusation against the prisoner to be sufficiently clear and positive in all material points. It is true that the day when the felony was committed is not mentioned in the affidavit of Mr. Wood, although it is in the warrant addressed to the sheriff; but from the circumstances stated of the prisoner's coming into this province immediately after the felony was committed, and his subsequent arrest here May last, this would be sufficient to hold him amenable to the law; the omission of a positive day or date being in many respects not so material.

2. That if a sufficient charge of a crime be made out against the prisoner, yet the Sovereign cannot lawfully deliver him up to the state where the crime is said to have been committed and even allowing, this right to the Sovereign, yet that it has never been practised or allowed, except in offences of the most aggravated nature, such as murder and robbery, but never in the minor offences of larceny and such like. This objection embraces the main points in the case, and the determination upon it, will, in a great measure, obviate all the other objections. In considering this part of the case much of the argument used must be laid out on the question, such as that founded on offences of a

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political nature, arising out of revolutionary principles excited in any government, as in these cases, the refusal of a state to surrender the accused cannot be drawn into precedent, for the authority of the state to which the accused has fled may well be extended to protect him rather than deliver him up to his accusers, and this upon a wise and humane policy, because the voice of justice cannot always be heard amidst the rage of revolution, or when the Sovereign and the subject are at open variance respecting their political rights; and, therefore, no state will ever be induced to deliver men up to destruction, nor even to malicious prosecution. We will also, lay out of the question all the cases depending upon treaties and conventions entered into between different nations, as in such cases the surrender of the accused by one nation to another is not so much the effect of the exercise of a prerogative right or power of the executive government, as the execution of a national convention binding on both parties. We must meet the case as it presents itself, which calls upon us to determine, whether for any crime, great or small, committed in a foreign state, there exists in the executive government of this country any authority to deliver up the accused to be dealt with according to the offensive laws of such foreign state. The crime charged against the prisoner is recognized as an offence against the laws of all christian and civilized nations, and this crime may be more or less aggravated according to the circumstances of every particular case. In looking at the authorities cited from *Grotius*, *Puffendorf*, *Vattel*, *Heinricius*, *Burlamaqui* and *Martens*, and to what has been written by them on this subject, we feel it unnecessary to make particular quotations from them in support

the doctrine in hand, because it is impossible that any unprejudiced man can read these authors without being satisfied that the principle here objected to, stands admitted as a thing understood, practised, and recognized by the comity of nations, that the offender against the laws of one nation, taking refuge with another, may be surrendered to the offended nation for the ends of justice. The difference of opinion among these writers as to the enormity of the offence, cannot affect the principle although it may vary the practice among different nations according to circumstances. This right of surrender, is founded on the principle, that he who has caused an injury, is bound to repair it, and he who has infringed the laws of any country is liable to the punishment inflicted by those laws; if we screen him from that punishment, we become parties to his crime,—we excite retaliation,—we encourage criminals to take refuge among us. We do that as a *nation*, which as *individuals* it would be dishonourable, nay, criminal to do. If, on the contrary, we deliver up the accused to the offended nation, we only fulfil our part of the social compact which directs that the rights of nations as well as of individuals should be respected, and a good understanding maintained between them; and this is the more requisite among neighbouring states, on account of the daily communications which must necessarily subsist between them. A modern writer (a) on the laws of nations, says, “La communication journalière entre deux païs limitrophes est inevitable, et elle doit être d’autant plus favorisée par leurs gouvernemens

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(a) Instit. du Droit des Gens, &c. par C. Gerard de Rayneval; liv. 2. ch. 3. § 4. p. 134.

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“ respectifs, qu'elle est naturellement fondées sur
 “ besoins reciproques, et qu'elle donne par la, lieu
 “ des changes, d'ailleurs elle établit entre les habit
 “ respectifs des liaisons, et un sorte de confiance
 “ assurent leur tranquillité, et contribuent à leur jou
 “ sances.” Indeed were we to take into account
 opinions of modern writers on international law,
 would be still more strongly fortified in the principl
 we here hold, and we see no reason why those o
 nions should be rejected. By lapse of time, by n
 combinations and events, and by revolution, the pr
 ciples of government may be altered and improve
 and we have in the present age, had many lessons
 teach us wisdom. At all events, we may safely s
 that at the present day, the world has become e
 lightened in the science of government, as well as in
 the other departments of human knowledge, far beyon
 what was known to those writers who have lived ce
 turies ago, and, therefore, that the maxims of govern
 ment of the present day may be considered at lea
 as well understood, and better adapted to the righ
 and feelings of mankind, than they could have been i
 the days of Grotius and Puffendorff.

But let us look more immediately to the laws o
 our own country, as the principles there adopted, mus
 serve to guide our decision on the question. Th
 law of England recognizes the law of nations as par
 of the common law of the land, and although upon
 this question, from the insulated situation of that coun
 try, we do not meet with numerous decisions on th
 point, yet we find enough to satisfy us that we ar
 holding to those principles which have been ther
 adopted. Here we must refer to the cases cited a

the bar, as furnishing the only light on the subject which we have at this moment been able to procure. In the case of *Rex v. Hutchinson*, (a) the court refused to bail a man committed for a murder in Portugal. In *Col. Lundy's* case (b) who was arrested in Scotland for a capital offence committed by him in England,—it was held, that he might be sent there to be tried. Justices of the Peace in England may commit a person offending against the Irish law, in order to be sent to be tried in Ireland. (c) So in *East India Company v. Campbell* it was held, that one may be sent from England to Calcutta, to be tried for an offence committed there. (d) In *Mure v. Kaye*, (e) Judge Bathurst said, “that it has been generally understood, that wheresoever a *crime* has been committed, the criminal is punishable according to the *lex loci* of the country against the law of which the crime was committed, and by the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed in bringing the criminal to justice. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into England; and it was a question, whether we could seize them and send them to Holland, and it was held we might. And the same has always been the law of all civilized countries.” It has, however, been said, that the cases of *Lundy*, *Kimberley*, and *Campbell*, do not apply, as the countries to which these persons were sent, were under the same dominion of the authority

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(a) 3 Keb. Rep. 785. (b) 2 Vent. R. 314.
(c) *Rex v. Kimberley* Str. R. 848. (d) 1 Ves. Sen. 246.
(e) 4 Taunt R. 34.

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sending them, and therefore there could be no question raised touching international law. This may be considered as ingenious, but we think not the true construction to be put upon these cases, for the question was the right to send these persons to a different country from that in which they then were, to be tried by the laws of that country for an offence committed against them, and without some law to warrant this, and none is cited or relied on, the Sovereign had more authority to send those persons to such distant countries for their trial, than he had to send them to a foreign country for this purpose; besides, we see nothing said in any of these cases which can lead us to believe that the decision was founded on the power of the Crown over these several countries; on the contrary, from what was observed in Campbell's case, we must believe it was the general principle we here contend for which was recognized. In that case the court is stated to have said, "that the government may send a person to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals." In the two other cases, the pretence that the offended country was under the same dominion, will not apply; the general principle is there clearly established, particularly in the latter of *Murray v. Kaye*, for there Judge *Heath* lays it down, as the law of all civilized countries, and although the particular instance for elucidating this general principle in the case of the Dutch sailors has been called a case of piracy, and as such always restrained among friendly nations, yet without a particular treaty on this subject this case presented only a question of international

which stood upon no better *right* than the pre-
 ; the particular circumstances alone could lead to
 re ready exercise of the right of interference of
 British Government, and accordingly we find it
 down in *Chitty's Treatise on Criminal Law*, (a) as
general principle, "that if a person having commit-
 d a felony in a foreign country comes into Eng-
 nd, he may be arrested here, and conveyed and
 ven up to the magistrates of the country against
 e laws of which the offence was committed," and
 ites as the groundwork of this principle the above
 of *Mure v. Kaye*.

Two cases have been cited as having been decided
 ne United States of America, applicable to that
 re us ; the one by Chancellor *Kent*, in the State
 New York, and the other by Judge *Tilghman* in
 State of Pennsylvania. We are happy to have the
 ions of enlightened men upon a question of this
 d laid before us, particularly from a country with
 ch our communications are so frequent, and our
 rests mutual. The opinions of these learned men
 however, at variance upon some points, so that
 question might still be considered as unsettled in
 t country, without some local law on the subject.
 cannot, however, help expressing our entire ap-
 bation of those principles which have been adop-
 and so forcibly applied by the Chancellor in
 judgment ; they appear to us to be founded on a
 interpretation of the law, and well suited to the
 tional intercourse and good understanding between
 e two countries. (b) The opinion and decision of

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a) Vol. 1. p. 16.

b) The case referred to is, *Matter of Washburn*, 4. Johns. Ch. R. 106.
 which it was decided, 1. That it is the law of nations, to deliver up

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Judge *Tilghman*, which has been cited, and relied on by the prisoner, does not seem to favour his case ; and would even say, that some parts of it make strong arguments against him. (a) According to the report of the decision which has been communicated to us, it would appear that one Short, who had fled from Ireland to the United States, was charged by an individual there with having committed a murder in Ireland, and was arrested at the instance of this individual, with a view to his being sent back to Ireland ; but no demand had been made of the accused by the government, nor had the executive of the United States directed anything to be done in regard to him, either as to his arrest or detention. The prisoner Short being brought before Judge *Tilghman* on the writ of Habeas Corpus, it became a question before him, how far the prisoner was liable to be detained under such circumstances. The Judge determined that he could not. But this is not the case of the prisoner before us, for he has not only been accused of a crime, but by the order

offenders charged with felonies and other high crimes, and who have fled from the country where such crimes were committed, into a foreign and friendly jurisdiction. 2. It is the duty of the civil magistrate to commit such fugitives from justice, to the end that a reasonable time may be afforded for the government to deliver them up, or for the foreign government to make application to the proper authorities for that purpose. 3. Even if such application is not made in a reasonable time, the party ought to be discharged. 4. The evidence, to detain a fugitive from justice, for the purpose of being surrendered to his government, ought to be such as would be sufficient to commit him for trial, if the offence was committed here. 5. The 27th article of the treaty of 1796, between the United States and Great Britain, was merely declaratory of the law of nations on the subject ; and since the expiration of that treaty, the general principles of the law of nations remain obligatory on the two powers. 6. Therefore, the Chancellor, or Judge of the supreme court in vacation, has jurisdiction to examine a prisoner brought before him on *Habeas Corpus*, and who had been taken into custody, on a charge of theft or felony committed in Canada, or a foreign state, from which he had fled, and if sufficient evidence appears against him he may be remanded ; otherwise he must be discharged.

(a) *Commonwealth v. Deacon*, 10. Serg. and Raw. 125.

the executive government it is directed that he shall be delivered up to the legal authority of that state where the crime was committed ; and from what we can collect of Judge *Tilghman's* decision, there is no reason to believe, that had the prisoner Short, when brought before him, stood in the same situation as the prisoner now does, he would have determined differently. We will make a short extract from this decision to show the reasonableness of this belief, from the general principles there stated, which we conceive to be consistent with the opinion we now hold ; he says, " I grant, that when the executive has been in the habit of delivering up fugitives,—or is obliged by treaty,—the magistrates may issue warrants of arrest of their own accord, (on proper evidence,) in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminal. On this principle we arrest offenders who have fled from one of the United States to another, even before a demand has been made by the executive of the state from which they fled. But what right is there to arrest in cases where the government has declared that it will not deliver up ? For what purpose is such an arrest ? Can any judgment be given, by which the executive can be compelled to surrender a fugitive ? most certainly not. If the President of the United States should cause a person to be imprisoned, for the purpose of delivering him to a foreign power, the judges might issue a Habeas Corpus, and enquire into the legality of the proceeding, but they have no authority whatever to make such delivery themselves, or to command the executive to make it. If these principles

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" be just, it follows, that, under existing circum-
 " stances, no magistrate in Pennsylvania has a right to
 " cause a person to be arrested in order to afford a
 " opportunity to the President of the United States
 " to deliver him to a foreign government. But what
 " if the executive should hereafter be of opinion, in
 " the case of some enormous offender, that it had
 " right and was bound in duty to surrender him, and
 " should make application to a magistrate for a war-
 " rant of arrest? That would be a case quite differ-
 " ent from the one before me, and I should think it
 " imprudent at the present moment to give an opin-
 " ion on it. *Every nation has an undoubted right to*
 " *surrender fugitives from other States. No man has*
 " *a right to say, "I will force myself into your terri-*
 " *tory and you shall protect me."* In the case sup-
 " posed, the question would be, whether under the
 " existing constitution and laws, the president *has*
 " *right to act for the nation*, or whether he must wait
 " until Congress think proper to legislate on the sub-
 " ject. The opinion of the executive hitherto has
 " been, that it has no power to act, and should it ever
 " depart from that opinion, it will be for the judges
 " to decide on the case as it shall then stand. Nei-
 " ther do I give any opinion whether the executive
 " of the State of Pennsylvania has power to cause a
 " fugitive criminal to be arrested for the purpose of
 " delivering him up. But confining myself to the
 " case before me, in which the arrest was made at
 " the request of a private person, I am of opinion
 " that there is no law to support it, and therefore the
 " prisoner is entitled to his discharge." Taking then
 the opinion of Judge *Tilghman* on the principle here

ated, and supposing that there existed a law in the United States, authorizing the President to act for the nation, as the prerogative of the King of Great Britain authorizes him to act in this behalf, there can be no doubt, but, that in the one country as well as in the other, what the executive legally directed to be done in regard of delivering up a fugitive, would be confirmed by the judiciary.

The objection, that the offence charged against the prisoner, is not of that enormity as either to require, or permit, that the executive should interfere to deliver him up, can have no weight. It would be difficult to establish a rule, where none has been settled, to enable us to distinguish the shades of enormity of different offences, their evil tendency, or pernicious effects, so as to limit the power of the prerogative as applicable only to such crimes as are productive of a certain *quantum* of evil in a state. The certain and positive rule laid down by all writers on international law, and the decisions had thereon, as above referred to, agree in saying, that where a *crime* has been committed, the criminal may be surrendered to the offended country. There is certainly great difference of opinion among these writers as to what kind of crime this ought to apply: some holding it to extend only to *high treason, robbery, and murder*, while others apply it to minor offences, and even to civil damage; but where the general right is acknowledged, it must be left to neighbouring nations to determine the necessity of enforcing it according as good policy and sound discretion shall require.

3. It is, however, further objected, that allowing the sovereign may have the power to deliver up a criminal

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to another state, yet that such power cannot be exercised by the governor of this province, who as the servant of the crown, cannot be considered as vested with the exercise of such high prerogative, or at furthest, it is necessary to show, that by his commission he is vested with this authority. It would certainly be considered rather extraordinary that this, or any other prerogative of the crown, necessary to be extended to every part of its dominions,—and none more than this province,—should require either the personal presence of the sovereign, or his express mandate in every case of the exercise of his right. This would render it nearly impracticable and certainly most burthensome to the subject when seeking to derive a benefit therefrom. But the prerogatives of the crown do not rest on this limited principle; they are equally in vigour in all its possessions, and may at all times be exercised when necessary for the general welfare. The principle as laid down by eminent crown lawyers and explained by Chitty, (*a*) is, that the King's prerogative in the colonies, unless where it is abridged by grants, &c. made to the inhabitants, is that power over the subjects,—considered either separately or collectively,—which by the common law of England, abstracted from acts of parliament and grants of liberties, &c., from the crown to the subject, the King could rightfully exercise in England; that is, that the common law of England,—with respect to the Royal prerogative,—is the common law of the colonies. As therefore, the prerogative rights in Canada are the same by law as in England, how are they to be exercised but by his Majesty's r

(*a*) On Prerogative 32-34. 1 Chalm. Op. 232-3.

representative in the colony? governors of colonies although but the servants and representatives of the King, yet are in general vested with royal authority, and exercise many kingly functions. If it be true, they cannot declare war, nor make treaties, nor do many other acts of royal authority, which involve the interests of the whole realm; but what regards the security, the interest, or the honor of the province over which he presides, every governor of a colony,—as the King's representative,—must hold and be authorized to exercise all royal prerogative incident to that situation, as a thing requisite for the maintenance of the public welfare, unless it has been particularly excepted and reserved by his commission. The governor is answerable to the King for this exercise of the prerogative, and for the right discharge of his duty, and if, in the case before us, the party be aggrieved, the question must be settled according to the principles of international law, between the sovereign of that country to which the prisoner belongs and the King's Majesty, but not by His courts of justice.

4. It has also been objected that no demand appears to have been made by the American government, or by any of the American states, for the surrender of the prisoner. But it is not for the court to enquire into this. The nature of the demand, and the sufficiency of it, must be best known to the executive, to which it is made, and which alone is competent to determine how far the royal prerogative ought to be exercised. What we have to determine is, whether there was legal ground for the arrest and surrender of the prisoner, and what hold there was. By the warrant of His Excellency

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the governor in chief to the sheriff, the latter is authorized to convey and deliver up the prisoner to such person or persons as, according to the laws of the said state of Vermont, may be lawfully authorised to receive him, that is, the executive authority of that state, and we must presume it was the same authority which demanded him. This is not, however, a question for our consideration.

But the prisoner comes before us in a very different character from that of a subject to whom protection is due as of right; he is an alien, to whom protection is not due, if the King sees fit to withhold it. The observation of Judge *Tilghman* may well be applied to him: "*That he cannot force himself into the King's territories and say you shall protect me.*" It is held (a) that alien friends may lawfully come into the country without any licence or protection from the crown; though it seems that the crown even at common law, and by the law of nations, possesses a right to order them out of the country, or prevent them from coming into it whenever His Majesty thinks fit: and the reason given is (b) that it is inseparable from the governing power in any country, that it shall be able to take precautions against foreigners residing in such country, and particularly in a country where foreigners are only amenable to the ordinary laws. The prisoner came into this province under suspicious circumstances, charged with a felony; as an alien his conduct did not merit protection,—unless he had come with a fairer character,—and he ought not to be surprised, nor to complain that

(a) 1 Chitty on Prerog. p. 49. 1 Black. Com. 259, 260.

(b) 1 Chitty, Crim. Law, 131, and 143. note (a).

His Majesty's government should direct him to be taken back to that country whence he came. *

Upon the several grounds alleged, therefore, the court have no hesitation in saying, that the prisoner cannot be liberated from the restraint under which he is held, but that he must be remanded to the custody of the proper officer for the execution of the warrant issued against him in the name of His Majesty.

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ON APPEAL FROM QUEBEC.

CHARLES JOURDAIN.....*Appellant*.

and

JOSEPH MIVILLE.....*Respondent*.

30th July,
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DWELLING HOUSE and two adjoining buildings, belonging to Felix Tetu, were taken in execution and sold by the sheriff at the suit of the respondent.

The mason has an especial privilege, in the nature of a mortgage, upon any

building erected by him and for repairs.

This privilege, however, will not be allowed to the prejudice of other creditors of the proprietor, unless within a year and day there be something specific to shew the nature of the work done or the amount of the debt due thereon.

In the 11th section of the Habeas Corpus Act (prov. stat. 24. Geo. III. § 11.) it is enacted, " That no subject of His Majesty, his heirs or successors, that now is or hereafter shall be an inhabitant or resident of this province of Quebec, shall, or may be sent prisoner into any province or into any state or place without this province, or into any parts, garrisons, islands, or places beyond the seas, which are, or at any time hereafter shall be, within or without the dominions of His Majesty, his heirs or successors; that every such imprisonment, or transportation, is hereby enacted and declared to be illegal." By the same section any person acting contrary to this provision is subjected to a penalty of £500.

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dent for the sum of £3000. The appellant, by opposition to the distribution of this sum, demanded 1. The sum of £500, the amount of an obligation from Tetu, bearing date the 5th day of October, 1820, to secure the same as a balance due to the appellant for work and labor performed in the building of the said dwelling house. 2. The sum of £300, the amount of another obligation, bearing date the 28th day of May, 1820, executed between the same parties. The sum of £797. 15. 6. for work and labor performed in and about the same dwelling house and adjoining buildings, alleging in his opposition, that by the laws, usages, and customs of this province a right had accrued to him to have the same by especial privilege out of the proceeds of the sale of the said dwelling house and adjoining buildings.

The right of the appellant to receive the sum first demanded was not questioned. The second was not awarded to him; and by the judgment of the court below the said sum of £797. 15. 6. was allowed to him but without any preference over Tetu's other creditors, and from this judgment the present appeal was instituted.

*A. Stuart and Black* for the appellant. *Hamel* for the respondent.

REID, CH. J. In the case of the mason for building, or for repairs done by him, the law allows a privilege, which to a certain extent has the effect of a mortgage upon the building or repairs so done, and gives him a preference thereon for his payment. This cannot be denied; the authorities of law are too numerous and decided to admit of doubt. But it is contended, that this privilege cannot be exercised

prejudice of a third person, without something specific to ascertain the nature and extent of the work done, or the amount of the debt due thereon, and all this within the year and day; so as not to deceive third persons, or lead them to trust their property in the hands of men, against whom,—either by connivance or otherwise,—such privileged claims may be brought forward. We are disposed to think the objection valid, and that the judgment here appealed from must be confirmed.

In looking at the jurisprudence on this subject it would appear, that previous to the *arrêt de règlement* of the 18th August, 1766. the decisions of the courts were not uniform, as to what would or would not entitle the mason to claim his privilege, even within the year and day, that is, whether a *devis et marché* previously made, and a *procès verbal* of the reception and value of the work subsequently done, were, or were not necessary. By some of the decisions, it would seem that these formalities were required, by others they were dispensed with. But the inconveniences arising from these contradictory decisions,—respecting a privilege which often extended, in its amount, to the value of a great part of the property in question,—were strongly felt: and by the above *arrêt de règlement*, a certain mode of proceeding was established, in order to secure the rights of all parties. We must, however, be satisfied how the question would have stood previous to the making of this *arrêt de règlement*, as to the diligence to be exercised by the mason in prosecuting his claim: we find according to the best established jurisprudence, that the workman,—claiming a privilege on the work

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done by him, but not founded on any authentic document of a nature to ascertain *when* the work was done, the *nature*, the *value*, and the extent thereof, was obliged to prosecute his claim within the year and day, so as to make the privilege available, when it came in contact with the rights of third persons. The end and object of the 127th art. of the custom of Paris, was to limit the extension of credit and to prevent lawsuits among persons of the description therein mentioned, often injurious to themselves and to those dealing with them. The words of the article are very strong, *ne peuvent faire action après un passé*, which would seem to imply, a limitation of action; and although by an equitable interpretation which has been put on this article, the mason, or other artisan therein mentioned may have his action against his debtor even after the year and day, yet in this case a certain discredit attaches to it, and if the debtor will avail himself of the *fin de non recevoir* such legal presumption is raised against the action that the whole is made to rest on the oath of the debtor. This is the case as between the workman and his debtor, but when his claim, with its attendant privilege comes in contact with the rights of a third person, the legal presumption,—against an unliquidated demand beyond the year,—becomes much stronger, and this privilege must yield to the authenticated claim of a more diligent creditor. This seems to be the principle of law to be observed, as far as we can collect from the opinions and decisions had on the question. *Denizart* (a) gives an instance where the privilege v

(a) *Denizart v: Privilege*, No. 38.

ndged to the mason who had not taken the precau-  
 n to obtain a *devis et marché*, this was previous to the  
*arrêt de Règlement* of 1766; but the author observes  
 on this judgment, "*qu'il doit être moins regardé*  
*comme un témoin de la jurisprudence du tribunal*  
*(chatêlet) que comme les derniers soupirs d'une opi-*  
*union mourante."* And in a note upon the case we  
 e told upon what principle this privilege was gran-  
 d. He says, "j'ai sçu depuis de M. Lois, que la ques-  
 tion avait été deux fois partagée dans cette affaire,  
 et qu'on s'était enfin déterminé à accorder le pri-  
 vilège, parceque dans le fait, il s'agissait d'une con-  
 struction totale et à neuf d'une maison sur une pièce  
 de terre; et que d'ailleurs les ouvriers s'étaient pour-  
 vus presque aussitôt les ouvrages finis, sans attendre  
 l'expiration de l'année, pendant laquelle la coutume  
 leur accorde action." In the authority cited by the  
 appellant from Lacombe, (a) after stating the prin-  
 ciple, that a *devis et marché* was not necessary to se-  
 cure the privilege of the workman, and citing several  
 decisions to that effect, he at last comes down to an  
*arrêt* de la "Cour des Aydes, 8 juillet 1728, au rap-  
 port de M. Amiot, sur l'ordre du prix d'une maison  
 sise à Fontenay, près Paris, vendue sur le Sieur  
 Taxis, receveur des tailles, par lequel les ouvriers  
 qui avaient travaillés à la reconstruction, et fourni  
 des matériaux, ont été colloqués par privilège, même  
 au Roi, quoique pareillement ils n'eussent point de  
*devis et marchés*, ni même de mémoires arrêtés, mais  
 seulement des sentences par défaut, depuis l'évasion  
 de Taxis, mais dans l'an des derniers ouvrages."

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(a) Lacombe v°. Subrogation, No. 16.

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This may be considered a strong case in favor of the privilege contended for by the appellant, but he falls short in that material point on which the judgment here was founded, the diligence done by the workman *dans l'an des derniers ouvrages*. We have also the opinion of other writers on this subject, *Bourjon*, says, “ ce privilège a lieu en faveur “ des ouvriers, selon moi, encore “ qu’il n’y ait aucun devis ni marché par écrit, pourvu “ que les ouvrages soient constans, ou que s’ils sont dé- “ niés, ils puissent être vérifiés, *et que l’ouvrier ait agi “ dans un tems compétent, c’est à dire, dans le tems que la “ coutume a fixé pour la durée de son action.*” (a) *Pothier* is somewhat more explicit in the reasons he gives, “ observez à l’égard de ces créanciers qui ont conservé “ ou mélioré l’héritage, que, pour qu’ils puissent ex- “ ercer leur privilège, il faut, ou qu’ils ayent donné “ leur demande dans l’année de la perfection de leurs “ ouvrages, parce qu’autrement il y aurait une fin ne “ non recevoir acquise contre leur créance ; ou qu’ils “ soient fondés dans un marché fait par acte devant “ notaire, ou du moins dans une obligation pardevant “ notaire, passée dans la dite année. *Un titre de cré- “ ance sous signature privée, est bien valable vis-à-vis “ du débiteur, et pareillement une obligation passée de- “ puis l’année ; mais ces actes ne doivent point donner “ de préférence au créancier contre des tiers, parce “ qu’autrement des débiteurs pourraient en fraude de “ leurs legitimes créanciers ressusciter des créances “ déjà acquittées.*” (b) Here we see the distinction evidently marked between the remedy which is still

(a) 2 Bourj. Des Exécutions, tit. 8. sec. 10. § 105. p. 597.

(b) Poth. Traité de l’Hypothèque, p. 453.

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preserved to the workman against his debtor for the value of his labor,—even after the lapse of the year and day,—and the privilege claimed thereon. The remedy of the debtor affects him only, he owes and justice requires that he should pay what he owes, nor can he avail himself of the tardiness of his creditor to proceed against him, while the debt remains unpaid; but in regard of the privilege, it is not extended on the same equitable principle with the action, because it tends to the prejudice of third persons, and to render ineffectual the security of *bonâ fide* creditors on the property of such debtor. Laches must always operate against him who looks for an advantage, and will in other cases besides the present, destroy the claim of privilege *quoad* third persons, who are often ignorant of the many dealings and transactions between their debtor and particular creditors, and cannot always be prepared to meet the contrivances that may be formed to frustrate their claims. The law, therefore, seems to protect the diligent creditor in a case of this kind, against a privilege which may be set up by collusion with the debtor, or upon the mere assertion of the workman, who shows no contract, nor any sufficient diligence to secure such privilege.

It is somewhat remarkable in this case, that when the appellant was taking the means to secure a debt due to him from the defendant Tetu, by obtaining the notarial obligation of the 28th May 1820, he should allow an open account of many years standing, and upon which he here founds his privilege, to remain unliquidated. It is a strong presumption that the appellant never looked to any other than the personal security of his debtor, Tetu, for this account. The

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appellant seemed satisfied that his claim should remain on that footing, and there we think it ought still to rest.

Judgment affirmed.

### ON APPEAL FROM QUEBEC.

THE HON. M. H. PERCEVAL.....*Appellant.*

and

PATERSONS AND WEIR.....*Respondents.*

18th January.  
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 An action of trespass on the case, for a misfeasance, can be maintained against a collector of the customs for exacting a larger sum for duties than the law authorizes, unless some reasonable ground of excuse for his conduct is shewn, or such facts be laid before the court as will exclude every imputation of malice or wilful intent.

If the declaration, in this

action, contain a statement of all the material facts, it will be sufficient.

Where special damages is the gist of the action, and it be not alleged, or, if alleged, be not proved, the action must be dismissed. But where the law gives a right of action for an injury, it presumes that damages are the consequence, and a conclusion for general damages will be sufficient.

THIS was an appeal from a judgment (*a*) rendered in an action against the appellant awarding damages against him for a breach of his duty as collector of the customs, in having exacted a larger sum than by law was allowed on the importation of certain goods. The appellant pleaded, 1. a demurrer. 2. the general issue. The former was over ruled, and after a hearing on the merits, the appellant was condemned to pay the damages demanded, viz: the sum of £19, with costs.

REID, CH. J. The appellant denies to the respondent a right to recover damages under the present form of action, because, 1. This action can only be considered as an action *condictio indebiti*, or an action to recover back the excess of duty paid, as to

(a) Reported ante p. 215.

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the appellant, as there is no ground upon which it can be maintained against him as a public officer, for any breach of his duty as such. 2. Enough is not stated in the declaration to maintain the action, and more particularly, because the sterling cost in the invoice of the goods imported is not set out so as to shew the amount due on that importation. That the duty of the public officer was not stated, nor were the circumstances of the injury or special damage so set out, that the appellant could answer thereto, or the respondent be entitled to damages.

With reference to these two grounds we must first determine what the nature of this action is, and we will thereby limit the objects of discussion to a few points. It cannot be considered as an action *condictio indebiti* or merely to recover back monies wrongfully paid. It is an action on the case for a misfeasance against a ministerial officer, in the discharge of his duty, not merely for refusing to perform what this duty required, but for exceeding his authority in the discharge of that duty; for compelling the respondents to pay more than by law they were bound to pay, not from any misapprehension of the law, but *wilfully* and *maliciously* with a view to injure the respondents, and to prevent them from importing these goods as by law they were entitled. This language of the declaration cannot be misunderstood, and upon an examination of the authorities cited, it will be found that this action can be maintained.

In the case of *Drewe v. Coulton*, (a) which was an action against a returning officer for refusing the vote

(a) 1 East's Rep. 563.

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of the plaintiff, Mr. Justice *Wilson* said, "this is, in the nature of an action for misbehaviour by a public officer in his duty; now I think it cannot be called a misbehaviour unless *maliciously* and *wilfully* done, and that the action will not lie for a mistake in law. In all the cases put, the misbehaviour must be wilful, and by wilful I understand contrary to a man's own conscience." But we need not have recourse to any law authorities to say, that no man shall be permitted wilfully to abuse his office, or by a malicious exercise of it to injure another without incurring responsibility in some shape. The declaration contains all that is requisite to support an action on the case against a public officer. "In actions on the case, when the act or nonfeasance complained of, was not *prima facie* actionable, it is, in general, necessary to state not only the injury complained of, but also the circumstances under which it was committed,—as that the defendant *maliciously and fraudulently contriving and intending*, &c. (stating a bad intent corresponding with the wrongful act complained of,) committed or permitted the act complained of." (a) Now this is sufficiently set out in the declaration. The *wrong*, the *injury*, and the *intent*. Again it is said, (b) "that the declaration in an action for nonfeasance in an officer, must shew that the defendant was an officer, what it was his duty to do, and that he acted contrary to his duty.

But it is contended by the appellant that the declaration is defective as it does not shew what the duty was which he had to perform, and more particularly, because the sterling cost in the invoice was not

(a) Chitty's Pl. p. 376.

(b) 5 Com. Dig. 590. (2°.)

set forth so as to shew the amount due on the goods imported. The provincial statute, (a) however, does not specifically require this, but merely says, that upon goods, wares and merchandizes imported into this province, a certain duty shall be paid, to be calculated on the *first or sterling cost* of each £100 worth of such goods. In the declaration we find it stated that on the 23d day of May 1825, the plaintiffs were possessed of divers large quantities of goods of the value of £648 10s. 1d. sterling money of Great Britain, which they imported into this province, at the port of Quebec, and which were liable and chargeable with certain duties to his majesty. That of this importation the plaintiffs gave notice to the defendant as collector, and then and there produced to the said defendant as such collector, the *original invoice of the said goods so imported*, and then and there offered, &c. All that was essential on this point is certainly here stated, and in a way to meet the objection made, viz: the sterling cost of the goods imported, notice thereof to the appellant, and a communication to him of the original invoice, the doing of what was needful thereon, the payment of the duties, &c. The declaration might have been more minute, but all the material facts are stated. In the authority last cited it is said, "if the declaration shews the misfeasance, it is sufficient, though it omits several circumstances not material."

It has been further objected, that this action cannot be maintained without shewing the special damage sustained by the respondents, and that the conclusion in the declaration "*to the damage of the plaintiffs*, so

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(a) 53. Geo. III. c. 11.

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*much,*" is too general and applicable only to cases of debt or assumpsit, where the conclusion in damages must necessarily apply to the extent of the debt or undertaking declared upon, but that in this case a general damage does not flow from the nature of the action, as the necessary consequence of the appellant's neglect of duty as a public officer. But the principle here assumed is taken too largely, a distinction must be made between cases of *general* and *special* damage, according to the circumstances of the case. If an action cannot be maintained, but by reason of the special damage occasioned by the act complained of, the special damage becomes the gist of the action, and if no special damage be laid, or if laid be not proved, the action must be dismissed. But when the law gives a right of action for an injury complained of, it presumes that damages arise from such injury, and a conclusion for general damages is sufficient. It is clearly settled that the law gives an action against a public officer for a wrong done by him in his office, when alleged to be done wilfully and maliciously, and damages, being a natural consequence, may be demanded generally.

Upon the general issue several objections have been urged, as there being no proof of notice of action ;—of the tender of entry to be made at the custom house ;—of the protest, or of the signature of the notary to it ;—of the entry in the books of the custom house under which the extra duty was paid,—the original not being produced ;—nor of any act done by the appellant personally.

We consider the evidence adduced to be sufficient on all these points. The only question which remains,—and the most material in the case—is whether

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ufficient evidence has been adduced to support the allegation of a malicious intention on the part of the appellant, by his refusal to receive the duty on the short prices of the goods imported and by exacting the duty on the larger or nominal prices. The evidence bears strongly against the appellant, it ascertains the fact that different individuals, at different times, and for a long time past, have made entries at the custom house on the invoices of goods imported by them and paid the duties upon the short prices, as a matter of course and without objection or difficulty. Independant of this being the interpretation to be put on the law, it would seem to have been the constant practice at the custom house to receive the duties upon the short prices. It does not appear to have been a matter of contest or of doubt, not a single instance to the contrary is shewn but the one before us, and it is difficult to account for its being raised on this occasion. It was the interest, and, we must say, the duty of the appellant to have laid before the court such facts as would have shewn some reasonable ground of excuse for his conduct, and thrown all imputation of malice or wilful intent out of the question. If he was in possession of such evidence, but did not see fit to adduce it, we regret that, as a public officer, he did not avail himself of so effectual a means of defence against an action of this nature. But taking the facts as they stand before us,—uncontroverted or explained by any evidence on the part of the appellant,—we find nothing to justify, or excuse his conduct ; he has made no case for the court to hesitate or deliberate upon, and we must draw

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that conclusion from the evidence which the court below has done.

Judgment affirmed.

DICKERSON *against* FLETCHER.

16th and 29th  
January,  
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In an action of trespass for assault and imprisonment, against the Provincial Judge of the Inferior District of St. Francis for issuing process of attachment for contempt against the editor and printer of a public newspaper, for publishing certain papers; held, that as the acts complained of were performed by the Judge in his judicial capacity the court could not take cognizance of them and therefore had no jurisdiction.

**T**HIS was an action of trespass for assault and imprisonment. In his declaration the plaintiff styled himself "Printer and Editor of the British Colonist and St. Francis Gazette," and designated the defendant as "Provincial judge of the inferior district of St. Francis." The defendant pleaded a declinatory exception, or an exception to the jurisdiction of the court, alleging that it could not take jurisdiction of the action, because he, the said defendant, at the several times in the declaration mentioned, and long previous thereto, was, and from thence to the time of the commencement of this action had been judge of his majesty's provincial court for the inferior district of St. Francis in this Province, and had of right holden and did still hold, the said provincial court by virtue of the statute in that behalf provided. That the judges of the said provincial court and other his majesty's provincial courts in this province, or any of them, were not responsible nor could the judicial conduct of them, as aforesaid, be called in question in the court of King's Bench for this district, or any

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other of his majesty's ordinary courts of judicature in this province, or otherwise, in any manner whatsoever, unless it were by way of impeachment before our lord the king and the imperial parliament of Great Britain and Ireland, or the provincial parliament of this province of Lower Canada, or by way of complaint before the king in his privy council, and that the several supposed trespasses in the declaration alleged to have been committed by him, consisted in his having, as such judge as aforesaid, and in the exercise of his public functions in that behalf, made certain rules and orders of his majesty's said provincial court, by virtue whereof certain writs of attachment of contempt were and had been issued out of the said provincial court against the plaintiff by reason of certain contempts thereof, which it was alleged the plaintiff had committed against the said court; and in certain arrests and imprisonments to which the plaintiff had been subjected, and which he had undergone accordingly under such writs of attachment of contempt and under certain judgments of the said provincial court in that behalf, and respecting certain matters of which the cognizance appertained to and were within the legitimate jurisdiction of the said provincial court, and that this action was brought for no other matter, cause or thing whatsoever. The plaintiff fyled a general answer to this plea; the parties were previously heard upon the pleadings when the adduction of evidence was ordered by the court. Evidence was accordingly adduced:—that of the plaintiff consisted of the original affidavits, the interrogatories and examinations shewing the origin of the charges of contempt and the



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course of procedure with regard to them :—the evidence of the defendant consisted of the examination of the plaintiff on *faits et articles* and the entries in the register of the provincial court relative to the several cases in which attachments had been issued or ordered against the plaintiff.

It appeared that there were four cases in which attachments of contempt had been issued or directed to issue. The attachment in the first case was founded on two papers in the *British Colonist* of the 2nd March, 1826, one of them was in the form of a letter to the editor, signed *Philo Junius*, and the other a report of a case which had occurred in the provincial court, with animadversions thereon, signed *Scrutator*. In this case the plaintiff had made an affidavit that the papers were published by him, but that he was not the author of them, at the same time stating who was the author, to which affidavits the original manuscripts were annexed. In the June term the court made an order, that the recognizance of the defendant and his bail should be discharged on his entering into a new recognizance, without sureties, to appear whenever he might thereafter be required. In the September term following the plaintiff moved, by his counsel, for judgment, and thereupon the court rendered a judgment of conviction imposing a fine of £5.

The second case was founded on two papers, one of them signed *Vindex*, and the other *F. A. Evans*, in the *British Colonist* of the 23rd November, 1826. The plaintiff upon conviction was condemned to pay a fine of £10 sterling and to find sureties for his good behaviour for three years.

In the third case an attachment had issued against

the plaintiff and another, for sending a written paper to the defendant charging him with having issued a writ of attachment against the plaintiff "without any reasonable or probable cause whatever," and at the same time giving him notice of his intention to institute an action against him. In this case the court made an order similar to that in the case first above mentioned.

In the fourth case a rule for an attachment had been made in consequence of a paper published in the *British Colonist* of the 9th November, 1826, but it did not appear that at the commencement of this action an attachment had issued.

Mr. Justice *Fletcher*. The defendant contended, that a judge is not in any case responsible for his judicial conduct before any of his majesty's ordinary courts of judicature. (a) It is remarkable, that from the earliest periods in the history of England to the present day there never had been an instance of an action against any man in the rank and character of a judge. The instance which came nearest to it was an action against the Recorder of London, acting as a commissioner of *oyer and terminer* at the Old Bailey, for fining a jurymen. (b) This action had been, not only dismissed, but most strongly reprobated by the court of Common Pleas as a bold attempt against the law and jurisprudence of the country. The authority of this case has been admitted upon every subsequent occasion that it had been mentioned;—in one instance as recently as the 28th of May last, when it was cited with approbation by Lord *Tenterden* in the case of

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(a) *Hawkins P. C.* B. j. C. 72, s. 6. and B. ij. c. 15 s. 24.

(b) *Hamond v. Howel*, 2. Mod. 218.

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*Garnett v. Ferrand.* If an action of this kind were instituted against a judge in England the proceeding would be set aside, even on motion, the plaintiff and his attorney would be attached and punished both by the court in which the defendant presided, and that in which the action was brought:—by the former for an attack on its independence, and by the latter, for an abuse of its process. Mr. Justice *Bayley*, in the case of *Burdett v. Abbott* (a) speaking of the responsibility of judges and of the power of revising their decisions in cases of contempt by other courts of judicature in actions brought against them or their officers,—said, that if they were responsible before any other tribunal whatsoever, they must be so *even before the lowest*. According to this doctrine, “if this court” (the King’s Bench of England) “were to adjudge a party to be guilty of contempt, and to direct an attachment to issue against him, and to commit him for that contempt, any other court, however inferior, might try the same question again in an action of trespass; and enquire whether or not the party was guilty of the facts of which this court had adjudged him to be guilty, and whether that fact was a contempt of this court,” and in another part of the same case the same judge also remarked, “that if an action could be maintained in any court it could be maintained even in the county court though it could not hold plea to the amount of forty shillings; for the plaintiff would only have to lay his damages at thirty-nine shillings and eleven pence, and the court then would be as competent to try the question and award damages to

(a) 14 East, 160.

that amount as the highest tribunal in the country." It is clear, therefore, that if this action could be maintained, every judge in the country would not only be responsible before his own court, and every other superior court in the province, but also before the provincial courts or even before commissioners of small causes—if trespass *vi et armis* were added to the list of subjects of which they could take cognizance,—to the amount of their respective jurisdictions, for every compulsory process which might be awarded ; and that nothing but confusion and the total annihilation of the judiciary could possibly ensue.

The majority of pleas alleging the judicial character of a defendant which are to be found in the books are in bar, not to the jurisdiction of the court,—and rightly so,—there never having been an instance of an action against a judge in the British dominions, and no other man having a right to object to the jurisdiction. As for example, if an action were brought against a justice of the peace in the provincial court of St. Francis, his conduct might have been unimpeachable or even laudable, or he might have exercised his judicial authority in a case where the court had no right to revise his decision, yet he must allege this by a plea in bar. He could not object to the jurisdiction, for the jurisdiction exists and is indisputable, there being no other tribunal before which he could be tried. If the defendant were a judge the case would be different, he would have a right to say, "the act complained of was performed by me in the exercise of my judicial functions. We are, it is true, answerable before each other as individuals but not as judges, *inter pares non est potestas*. My judicial cha-

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racter, and my conduct in the office which I bear, are sacred and can only be called in question by that power from which the authority of us all emanates. Here, therefore, your jurisdiction fails, and I beg leave to suggest this for your own decision, subject of course to a right of appeal on my own part, if I shall conceive the judgment in this case to have been erroneous."

It will be argued by the plaintiff's counsel, that the whole business of contempts, and particularly such as were supposed to have been committed out of court, was altogether *coram non judice*, and that the present action, therefore, must lie. The universality of this proposition must be denied, and the case now before the court affords a proof that if the proposition were in any case true, it is not generally so. The plea itself suggests that this case is now *coram non judice*, and that this court had no right to take cognizance of it. If such a doctrine were admitted it would of course follow that if the court should reject the plea and proceed to judgment and execution and that that judgment should afterwards be reversed by the court of appeals an action would lie at the suit of the present defendant against the judges now on the bench for having so done. Now, it is contended, that no such action would lie, and applying this case to the one before the court, if it should be conceived that the judge of St. Francis has erroneously imagined that a matter was within his jurisdiction which this court may think was not so, it by no means follows that he would be liable to an action for such an error in his judicial decision.

The next question which would be agitated on the

other side was, whether the ten judicial public functionaries directed by the provincial statute 34th, Geo. III. c. 6. to preside in the several courts of King's Bench and provincial courts thereby established, are really judges, and entitled to the privileges and immunities which belong to the order, at all times and upon all occasions when acting in the execution of any of the multifarious duties with which they are charged by that act ; or whether only eight of them are so, and that only when acting in the execution of a comparatively small part of those duties, that is to say, when sitting in the superior terms of the courts of King's Bench. It is contended that they are, all of them, judges, and upon every decision where they are executing any part of their judicial functions, for the following reasons :—1. The judges of England are considered as being so, whether in bank, at *nisi prius*, or on any other occasion where they are called upon to execute any part of their public duties though they sit under a great variety of commissions, some of a general and others of a circumscribed nature, some of them temporary and others permanent, and many of them of a very subordinate description to the original patent by which they were first constituted judges. 2. Because the judges of the courts of King's Bench in Lower Canada, when sitting in the inferior terms, or on the *tournées*, cannot be entitled to any privileges or immunities which do not equally belong to the judges of the provincial courts. If the pecuniary extent of the jurisdiction of the court be considered as the criterion between the responsibility and irresponsibility of the judge ; this criterion would as well apply, to render a judge of the court of King's

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Bench, when sitting on either of the two last mentioned occasions, responsible in an action in his own court or in any other in the province, as it would to render a provincial judge so liable. Every clause of the statute 34th, Geo. III. c. 6, in which the several courts are spoken of, either expressly gives them the same general powers and immunities which belong to all courts of record, or clearly evince the understanding of the legislature, that they should possess them equally from the time of their establishment, by the common law of the land. The 11th section of this statute expressly gives the same powers in vacation to the judge of the provincial court at Three Rivers as are given to the judges of the courts of King's Bench for Quebec and Montreal, and classes them together in the same sentence. The 22d section in declaring that the refusal to surrender and deliver certain records by the officers of the courts of common pleas to the clerks of the courts of King's Bench and provincial courts established by that act, shall be deemed and considered to be a contempt of the last mentioned courts,—which would otherwise, perhaps, have been an extremely doubtful point,—takes it for granted, that the courts of King's Bench in their superior term, and the provincial courts, possess equally the power of punishing contempts whether committed in or out of court, and accordingly classes them in the same sentence. The 33d section in declaring that other acts of the same nature, by the officers of the courts of request, shall also be considered as contempts, classes the provincial courts, in like manner, with the inferior terms of the courts of King's Bench, making no difference whatever between them with re-

gard to their general power of punishing for contempts. Taking these two clauses together the legislature must have understood that the provincial courts ranked with the superior terms of the courts of King's Bench in cases where they were to take cognizance of actions for more than the amount of £10, and with the inferior terms of the same courts in cases where the cause of action did not amount to that sum; thus holding a kind of intermediate rank between them, and that all the three descriptions of courts were coequal with regard to their general power of punishing contempts, whether committed in or out of court. With regard to the provincial court of St. Francis, it would be found that by the 2d section of the statute 3, Geo. IV. cap. 17, by which that district was established, it is enacted "that there should be appointed a judge *for the said inferior district*, who should hold a provincial court for the said inferior district, evidently indicating the sense of the legislature that the public functionary so to be appointed, was to be a judge, and that the powers and authorities of the provincial court which he was to hold as a part of his public duty, had been sufficiently designated and described by the antecedent statutes, by which the provincial courts already in existence had been established. There were other clauses, also, in the St. Francis act 3, Geo. IV. cap. 17, which, when compared with the correspondent ones in the antecedent act 34, Geo. III. cap. 6, manifestly evinced the same general intention on the part of the legislature, that the courts, established by each, were to be deemed and taken to be of the same description. The first part of the 7th section of the St. Francis act,

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which relates to evocations from the provincial court of St. Francis, is in exactly the same terms,—as the latter part of the 10th section of the judicature act 34, Geo. III. cap. 6, which relates to evocations from the inferior terms of the courts of King's Bench for Quebec and Montreal, and the 21st section of the same act which relates to evocations from the courts of *tournée*, manifestly shewing that the legislature thought there was no difference between them. The latter part of the last mentioned section in the St. Francis act which relates to the recusation of the judge of the provincial court of St. Francis in certain cases, is also in the same terms, word for word, as the 13th section of the old judicature act 34, Geo. III. cap. 6, which relates to the recusation of the judge of the provincial court for Three Rivers in similar cases, also indicating that the legislature clearly understood that there was no distinction whatever to be made between the two provincial judges of Three Rivers and St. Francis in this respect. With regard to the general rank of the judges of the provincial courts, as well as of those of the courts of King's Bench, as judges, it is to be observed, that they all sign the same state roll, and take and subscribe the same ancient and solemn oath which is appointed to be taken by the judges of the land; that the provincial judges were and always had been distinguished by the same titles and signatures as belong to the *puisé* judges of the courts of King's Bench, and that they always have been, since their first institution, placed in succession at the head of all the commissions of the peace for every district in the province, the whole of which marks of distinction belong only

to the judges of the land in any of his majesty's colonial dominions.

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The only remaining question which it appeared probable, could be drawn into discussion by the Counsel for the plaintiff, was that which related to the general power of punishing for contempts by courts of record. This must be decided by reference to the criminal law of England, which had become a part of the code of this country by the operation of the British statute of 1774, of which this subject formed a very large head. If it were to be contended that a difference exists with regard to contempts committed in or out of court, such a distinction did not appear from the authorities to be clearly marked; on the contrary all the best writers asserted that it did not exist, or at any rate, not with regard to those courts in which the judges of the land preside. As respects contempts committed by contemptuous words or writings respecting the court, Hawkin's Pleas of the Crown (a) may be referred to, and every other writer on the crown law who has treated of the subject of contempts against courts of judicature. The most copious and elaborate essay, however, on contempts of this description, and the *rationale* of the law respecting them, is to be found in a judgment prepared by Lord Chief Justice Wilmot. (b) The whole of the doctrine there stated has been uniformly recognized in every case which has occurred since, respecting matters of this nature, and particularly by Lord *Ellenborough* in the case of *Burdett v. Abbot*. (c) The exclusive right of every court to judge of contempts committed against it, is also most clearly

(a) Book 2, c. 22. § 36.

(b) Wilmot's Decisions, 243-271.

(c) 14 East. 131.

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established by every authority which is to be found upon the subject from the earliest periods. Several cases of contempts committed out of court, as well as in, are cited in the case of *the King v. Crosby*, and particularly one of a commitment by the court of chancery of Durham, a local and provincial court of limited jurisdiction in England, in which the defendant having been brought up before the court of common pleas by *habeas corpus*, was not discharged, but re-committed. Lord Chief Justice *De Grey* alluding to the general power which courts possess, of punishing for contempt, remarked, with reference to this case,—in the case of *Crosby*,—"that no court can judge of any contempt committed against another court, because the circumstances may be very different in respect of the constitution and practice of the courts themselves. Perhaps a contempt in the house of commons, in the chancery, in this court, and in the court of Durham, may be very different; therefore, we cannot judge of it, but every court must be judge of its own contempts." In the case of *the King v. Flower*, (a) the opinions of the judges were delivered in very emphatical terms: that of Lord *Kenyon*, with regard to the right of punishing for contempts committed out of court, as well as in the face of it; and that of Mr. Justice *Grose*, respecting the exclusive right which every court possesses of judging of contempts committed against itself.

The necessity that this power of punishing contempts in the judges of the courts of record should exist, is recognized even in the United States of America, a country in which the hostility to every species of domina-

(a) 8 T. R. 323. 325.

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tion by man over man, was carried to its highest degree. Chancellor *Kent*, after stating the details of a long and hard fought controversy between the courts in that country on this subject, by writs of *habeas corpus* and actions against judges, (which had taken place several times there, though there was no instance of the kind in England,) proceeds as follows: "The result of that controversy leaves the following principles undisturbed, and tends to settle and confirm them. 1. That every court has a right to commit for contempt, and that no other court has a right, upon *habeas corpus*, to control that commitment; 2. that no judge is responsible, in a private suit, to pains and penalties for his judicial acts. If any doubt had remained as to the ultimate effect of the decisions in the case of *Yates*, that doubt was entirely removed by the act of 1818, already referred to, which declared, that a party in prison for a contempt could not be discharged on a *habeas corpus*, so long as the power of the court which determines the contempt continued. The act may be considered as *only declaratory* of the established principle of law, that every court of justice has a right to commit for contempts, and that it belongs exclusively to the court offended, to judge of contempts, and what amounts to them; and no other court or judge can, or ought to undertake in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction. This may be considered as the established doctrine equally in England as in this country." (a) There have been several cases in the United States where these principles have been adopted, as upon the trial of *Whipple* and *Strang*, for the murder of the husband

(a) 2 Kent's Commentaries on the Laws of the United States, p. 26, et seq.

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of the former before a court of *oyer* and *terminer* and gaol delivery, where an attachment was awarded against a reporter for the public papers.

That it was not necessary to press further that part of the argument which related to the inconvenience which would arise, and the inevitable destruction of the judiciary body which must ensue if this action were maintained, being well aware that the court would state what the law really was upon the subject, and in conformity to the oaths which its judges had taken without reference to consequences. That the defendant had acted according to the best of his judgment and the dictates of his conscience with regard to the case before the court, and he was persuaded that it would do the same as respects the question now submitted to them.

*De Tonnancour* on the same side.

*Vezina*, contra, contended for the plaintiff, that the immunity claimed by judges belonged to them only so long as they acted within their appropriated jurisdictions, and that so soon as they exceeded the limits of their respective authorities they became as responsible in an action at the suit of any individual who might be injured, as any other person who had no authority whatever. The cognizance of contempts and particularly of contempts out of court, did not belong to the provincial judges, and that point has already been decided in this court in 1816, where damages had been actually awarded against a provincial judge for having directed an attachment for a contempt, supposed to have been committed by the publication of a disrespectful paper respecting his judicial conduct, as provincial judge, in one of the public journals. The law was the same in

France with regard to judges in that country; and that as questions of civil right were to be decided by the French law,—this being a question of that description,—the plaintiff is entitled to a judgment in his favor, and the plea of the defendant must accordingly be overruled.

*Bostwick*, heard in reply.

The court having taken time to consider of its judgment it was delivered by *Pyke*, *Justice*, on the 29th day of January, and entered upon record in the following terms: “The court having heard the parties by their Counsel upon the declinatory exception fyled by the defendant in this cause, and it appearing by the evidence adduced upon the issue raised upon such exception, that the present action of damages has been brought against the defendant for certain acts by him done in his judicial capacity; namely, in taking cognizance, as judge of the provincial court of the inferior district of St. Francis, of certain contempts alleged to have been committed by the said plaintiff against the said provincial court, of which said judicial acts this court cannot take cognizance or award damages, therefore and consequently hath not, by law, jurisdiction in the present case. It is, therefore, considered that the said declinatory exception be, and the same is, hereby maintained, and that the action of the plaintiff be, and the same is hereby dismissed with costs.”

See *infra* p. 296. the note upon the case of *Taoffe* against the Chief Justice of the Court of King's Bench in Ireland.

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GUGY *against* KERR.

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An action  
will not lie  
against a  
judge for any  
act done by  
him within  
the extent of  
his jurisdic-  
tion.

THE plaintiff, a proctor of the court of vice admiralty, was suspended by the defendant,—the judge of that jurisdiction,—from the exercise of his functions as such proctor, and this was an action for damages alleged to have been sustained by reason of the plaintiff's suspension. The first count of the declaration stated, that at the time of committing the grievance complained of, the defendant was judge of the court of vice admiralty. That the plaintiff was and had been an attorney, advocate, solicitor, proctor and counsel therein, and had been employed to defend certain suits against the brig *Sneaton Castle* and the ship *Bolivar*, which were respectively dismissed, and upon the dismissal thereof certain pretended fees had been claimed by the defendant as such judge, and the registrar, marshal, and crier of the said court, from the plaintiff. That on the 18th day of July, 1827, certain proceedings were instituted in the said court in the name of the late registrar and other officers, who, by petition to the said defendant, as such judge, did falsely, wrongfully, and injuriously represent that many of the fees and emoluments due to them from their respective offices still remained unpaid, particularly in the cases of the *Sneaton Castle* and the *Bolivar* in which the plaintiff had appeared, as proctor for the impugnant, and prayed that the proctors of the said court might be admonished to make payment of such

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fees; whereas no such fees were due, nor had the said defendant, as such judge, any power by law to compel him to make payment of such pretended fees, nor any jurisdiction over such pretended claim of fees against him. Yet the defendant contriving to injure the plaintiff, knowingly, maliciously, and unlawfully claimed and exercised jurisdiction over the said proceedings and ordered that a copy of the said petition should be served on the proctors whom the same might concern. That the said defendant, on the first of August, 1827, rejected the prayer of the plaintiff's proctor to appear and plead to the matters alleged in the said petition. And the said defendant designing unduly to draw the cognizance of the said claim of fees, which especially belongeth to the court here, to another determination in the said court of vice admiralty before him, the said plaintiff, and under the false and unfounded pretext that, by resisting such claim of fees the said plaintiff had wilfully disobeyed the rules and orders of that court, maliciously, unlawfully, and without any lawful or probable cause, suspended the plaintiff from the exercise of his functions, whereby the plaintiff was injured and damnified in his business and reputation and brought into public scandal and disgrace and was obliged to expend divers large sums of money including not only the pretended fees claimed by the said late registrar and other officers, but also the fees claimed, as of right, by the said defendant, as such judge, amounting in the whole, &c.

There were two other counts in the declaration stating the above facts and denying the jurisdiction of the defendant in more general terms. The defen-



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dant pleaded a general demurrer, upon which the *Attorney General* and *Primrose* were heard for the defendant and *A. Stuart* and *Black* for the plaintiff.

SEWELL, CH. J. This case has certainly been ably argued on both sides, but a wide field has been chosen for the argument and the jurisdiction of the court of vice admiralty, instead of being partially investigated, has been generally discussed. This is an action for damages sustained by the plaintiff under circumstances which, as it is said, render the defendant responsible for a judicial procedure; but the question which we have to decide has been raised by a general demurrer to the plaintiff's declaration and the single enquiry is, does the plaintiff's declaration set forth a legal cause of action? If it does not the demurrer must be maintained and the action dismissed.

Where the members who constitute a court of justice of limited authority err in their judgment, when they are acting within the extent of their jurisdiction, they are not amenable to individuals for their conduct in any shape whatever; but if they assume to themselves a jurisdiction or authority which they have not by law, they become liable to the parties aggrieved, and responsible to them for the consequences of their misconduct. The reason of this distinction is obvious;—while they act in the exercise of a legal jurisdiction they act as judges and they cannot be independant in the administration of justice if they are not protected. The errors, therefore, which they commit, are to be remedied by appeal and there is no other mode of redress; but when they take upon themselves a jurisdiction to which they are not entitled, they cease *quoad hoc* to be judges; and their

proceedings being, in such case, *coram non judice*, they are no longer entitled to that exemption from responsibility towards individuals by which judges for the public benefit are by law defended, while they are in the due discharge of their lawful duties ; and they become liable to the parties aggrieved in damages which may be sought and obtained by action in other courts of superior jurisdiction.

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There is a wide difference, therefore, between an assumption of jurisdiction and an improper exercise of jurisdiction ; and if the declaration does not allege facts which amount to an assumption of jurisdiction this court cannot interfere. Now, it is stated, that the plaintiff is a proctor of the court of vice admiralty,—that the registrar, the marshall, and the crier of that court presented a petition to the defendant, being then the judge, in which they complained of the plaintiff for the non-payment of certain “ fees which were due and of right payable to them by and from the said Conrad A. Guky,” in certain cases which had been pending in the court of vice admiralty in which the plaintiff had acted as proctor, and prayed that the plaintiff should be “ admonished to make payment of such arrears of fees as of right belonged to them, in virtue of their respective offices.” That a copy of this petition was ordered, by the defendant, to be served on the plaintiff, and he was required to answer it. That an order was afterwards made by the defendant by which he the plaintiff was suspended from the exercise of his functions, as a proctor in the court of vice admiralty, in consequence of the proceedings had upon this petition.—This is the gravamen of which he complains, and for which he demands da-

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magés.—Admitting this to be true it cannot amount to anything more than an improper exercise of jurisdiction. The claim set up was by three officers of the court of vice admiralty against a fourth officer of the same court, the whole matter was thus entirely *inter se*, and there can be no doubt that every court must, necessarily, possess a jurisdiction over its own officers ; if it has been improperly exercised in this case the remedy is by appeal and not by action in this court. In the case of *Leigh* who was a proctor in Doctor's Commons and by that court removed from his office, for refusing to pay a fine of ten shillings imposed upon him by order of that court, the judges of the king's bench in delivering their judgment said " officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend ; and the judges, or those who have the supreme authority in such courts are the proper persons to censure the behaviour of their own officers ; and if they should be mistaken, the king's bench cannot relieve." (a) If any wrong be done in this case the party must appeal. (b) This court is unanimously of opinion that the demurrer must be maintained.

Action dismissed.

(a) 3. Mod. R. 335. (b) See the case of *Orenden*, Holts R. 435.

It is laid down in 2 Bacon's Abridgement, p. 388, that " although the judges are to judge according to the settled and established rules and ancient customs of the realm, approved for many successions of ages, yet they are freed from all prosecutions for any thing done by them in court, which appears to have been an error of their judgment ;" and more recently it has been laid down as a legal principle not to be controverted, that " whoever is clothed with a judicial character, whether he be judge of a superior or of an inferior court : whether sitting at the commission of oyer and terminer, or at the quarter sessions : whether the forum in which he presides be of peculiar jurisdiction, sheriffs court or manor court, or whether acting under charter as the censors of the College of Physicians, all and every

when called upon in their judicial capacity to decide in their respective forums, upon cases brought before them, are, although their decisions be illegal, and their judgments founded in error, equally protected from action."

This was decided in the Court of Common Pleas in Ireland, in Hilary Term, 1813, in the case of *Taaffe v. Downes*, where the subject underwent a very full and very able investigation. The plaintiff in that case having been arrested on a warrant of the Lord Chief Justice of the King's Bench, an action for false imprisonment was brought by him against that functionary: and the judgment of Mr. Justice Fletcher, from which the passage above cited is taken, the annotator ventures to pronounce one of the most profound and admirable pieces of judicial discussion, which the law reports of either country can furnish. It exhibits an union of research the most laborious, of investigation almost interminable, and of reasoning the most conclusive, with views in the highest degree liberal and constitutional. His review of the value of reports and dicta is enlightened and unanswerable, and the sketch of the character of Lord Mansfield, and of the Court of King's Bench during the time he presided over it, bespeak no ordinary powers of discrimination and of description. The defendant in the case in question, having pleaded in justification of the arrest, that he was Chief Justice of the Court of King's Bench in Ireland, with all the immunities and privileges to the office belonging, and that as such Chief Justice he issued the warrant on which the plaintiff was apprehended, without setting forth either the informations on which he acted, or averring that he acted on informations at all, it was argued in support of the plea that no action could be brought against a judge for any act whatsoever done by him in his character as judge. This view of the case which was adopted by the majority of the court, and formed the ground of the decision, was combatted by Mr. Justice Fletcher, who laying down the law in the terms above cited, and admitting it in its fullest extent as a principle not to be controverted, as applicable to a judge when acting judicially, yet argued with great cogency of reasoning that the judges of the court of king's bench being conservators of the peace of the kingdom, have, like other justices of the peace, a ministerial as well as judicial authority, and that in this case the chief justice in issuing a warrant for the arrest of the plaintiff was acting ministerially, (at least not judicially) and therefore, that not showing in his plea that he acted on informations, and so within the limits of his authority, he was answerable in an action, like any other justice of the peace; and after many valuable observations on the importance of judicial purity and independence, he concluded his able judgment, by regretting that the respected and incorruptible defendant had been advised to rest his defence on the privilege of his office, which, as he observed, if maintainable, in fact amounted to a privilege of arbitrary imprisonment, instead of availing himself of that unanswerable ground of defence which in point of fact he had, namely, the sworn informations against the plaintiff, on which like any other justice of the peace, he issued the warrant for his apprehension.—(See Report of the arguments and judgment upon the demurrer in the case of Henry Edmund Taaffe v. The Right Hon. William Downes, Lord Chief Justice of the King's Bench in Ireland, in Trinity, Michaelmas, and Hilary Term, 1812 and 1813, in the Court of Common Pleas in Ireland, by John Hatchell, Esq. Barrister at Law.)

*Mac Kenna's notes on the civil code, p. 11.*

In the case of *BEURAIN, Gent. v. RIGHT HON. SIR W. SCOTT*, tried on the 6th March, 1813, before Lord ELLENBOROUGH, it was held, that an action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the

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court had not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order,—and that the practice of the ecclesiastical court is a matter of fact to be proved by evidence and left to the jury.

The jury found a verdict for the plaintiff with *forty shillings* damages, observing, at the same time, that they did not mean to throw the slightest reflection upon the highly respectable character of Sir *William Scott*. 3. *Campbell*, 388.

BLACK, TUTRIX, *against* NEWTON *and* BUDDEN,  
*opposant.*

19th April,  
1828.

An attachment will lie against two persons, appointed by commission from the crown to the office of sheriff, for the non-payment of monies levied by one of them, altho' the other may not have assumed the duties of the office, or acted in any manner under their commission.

A RULE was obtained in this case ordering William Smith Sewell, and Thomas Ainslie Young, Esquires, late sheriff of the district, to shew cause why attachments should not be granted against them for not paying over the sum of £63, awarded to the opposant by a judgment of distribution of this court.

On the 16th of October, 1826, Sewell and Young were by Letters Patent under the Great Seal of this Province, appointed "to be jointly and severally sheriff of and for the district of Quebec during pleasure and the residence of the said William Smith Sewell and Thomas Ainslie Young, within the district of Quebec, with all and singular the powers, authority, profits, privileges, emoluments and advantages belonging to the said office and bailiwick." The rule was resisted on the part of Sewell only, who it appeared did not take the oaths of office under his commission. The sum in question was not levied by him but by

Young, under the order of the court to him made individually. At the time it was levied Sewell was absent from the province, with the consent of the Governor-in-Chief, and an affidavit was made by Young in which he deposed that he never associated with his own name that of Mr. Sewell, for the execution of any act under their commission, but in all things acted as sheriff separately and alone.

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KERR, *Justice*. The word *sheriff*, in the singular number, not only in grammatical but in legal construction, shews the *entirety* of the office, and in the language of Lord Coke in *Curles's* case, it is but *one office* for which two are named, to supply it. The grant is of an incorporeal hereditament, in joint tenancy, wherein there must necessarily be unity of interest, of title, of time and of possession. There can be no severance of the office by one of the two, either by nonfeasance or misfeasance ; for it is vested in both and may be executed by either of the co-sheriffs or by both of them. In respect of Sewell's neglect to take the oaths which has been insisted on, this may subject him to be proceeded against by information, but can in no degree operate as a severance of office ; for as is laid down by the court in Modern report (a) and referred to by Bacon, " if an officer be created by letters patent, he is a complete officer before he is sworn and before any investiture." And it has been holden even when assigned by deed, the deed executed is the instrument which the law hath appointed instead of livery. If a different rule prevailed it would lie in the power of either of the co-she-

(a) Vol. I. p. 123.

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riffs, by refusal to assume the office, to defeat the intention of the crown which was, by appointing two, to insure the better performance of its duties, and to encrease the security of the suitors. It equally matters not whether, as is alleged, Sewell absented himself from the province immediately after the instrument had passed the great seal and that the court proceeding upon the sole returns of Young had adjudged him by name to pay these sums ; for the office having vested both in him and Sewell the moment the letters patent had passed the great seal, it was not in the power of the latter to get rid of that responsibility which had equally attached to him as to his colleague.

It has been strongly urged against this application that we are bound to take notice of our own officers and that the court did not, during Sewell's absence in England, recognize him as a co-sheriff ; however, it must not be forgotten that though the office is one it might be executed by either, *jointly and severally*, nor is it universally true that a writ should be directed to and returned by both of the co-sheriffs where there is " an unity, particularity and identity in the office ;" for in the case of *Rich v. Player* (a) where one of the sheriffs of London brought an action against the Chamberlain, the process of *venire facias* was directed to and returned by the co-sheriff. The case of *Bethel v. Harvey* and other cases have been referred to as establishing the same doctrine. The other grounds on which this rule has been opposed are better calculated to induce the court not to decline indulging

(a) 2. Shower, 286.

this summary course of proceeding by way of attachment than to exonerate Sewell from responsibility. It has been said that he might have been appointed to the office against his will, as that he might have been ignorant of his appointment, though it appears from his affidavit that the uniting of Mr. Young with him in a new commission, was a matter of accommodation to himself to enable him to pay a visit to England. If in point of fact the commission had been forced upon him against his will, or without his knowledge, and that he had in no degree participated in the fees and emoluments of the office during his absence, and these facts had been made out to the satisfaction of the court, we might have left the parties aggrieved to their remedy by special action on the case. But in the absence of any such proof, were we to refuse these applications for relief, we should renounce that unquestionable right which we have over all persons who are entrusted with a share of the justice of the court, and abdicate the trust reposed in us for the security of the suitors.

BOWEN, *Justice*. If there be one thing more important than another in the administration of justice, it is that courts should at all times hold a strict and vigilant guard over the conduct of their own officers; and that suitors, after they have obtained judgment in the courts of law, to which they are compelled to resort for justice, should meet with no impediment in the attainment of their rights, and more particularly from those persons who, under the authority and sanction of the laws, have been interposed for the execution of the King's writs and the protection and benefit of the subject. The courts here, as well as in England, are bound to notice judicially, the manner of appointing

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the several officers of justice, and though no statute regulations are to be found in our books, directing the mode or manner in which sheriffs are to be chosen and appointed, yet we have one point established beyond the possibility of contradiction, and which goes far to decide the present question, namely, that by our own ordinance of 1785, (a) process in causes exceeding £10 sterling, issuing from the court of King's Bench in Canada, is required "to be directed to and executed by the *sheriff* of the district, where such court shall have jurisdiction, and in which the defendant may be or doth reside, &c." It is clear, therefore, from the words of the ordinance, that there cannot be two or more sheriffs, and whether the number of persons in the commission be two or more, they, nevertheless, in contemplation of that law, can constitute but one office, the office of sheriff, and accordingly the Letters Patent do "constitute and appoint William Smith Sewell, and Thomas Ainslie Young, to be jointly and severally sheriff," and not sheriffs of the district of Quebec.

In England the office of sheriff is rarely found to be a lucrative one, indeed it is so far from being so considered, that persons duly nominated or pricked off, as it is termed, are subject to be amerced £500 for refusing to qualify and take the oaths of office. With us, however, the office is not an annual one cast upon the individual by law, but is held from the Crown, as all others during pleasure, and is an office of emolument. In the nature of things, therefore, to say that Sewell was appointed without his consent, is to say that which the facts do not warrant: on the contrary his own affidavit shews the reason why he did not take the oaths of

(a) 25, Geo. III. c. 2, § 1.

office, namely, that he had obtained leave of absence, from the King's Representative, and that the Letters Patent or commission, now under consideration, issued at his own request, he having been sheriff of this district from 1822, until the 28th May 1824, when Young was associated with him, "and constituted with the said William Smith Sewell, to be jointly and severally sheriff of the district of Quebec, to hold the said office during pleasure, *and the absence* of the said William Smith Sewell from the said province of Lower Canada." Now mark what follows:—These two commissions are revoked by the commission in question, of the 16th October 1826, which appoints Sewell and Young, to be jointly and severally *sheriff*, not as in the foregoing commission of May 1824, during the absence of Sewell, but "during pleasure and the residence of them the said William Smith Sewell and Thomas Ainslie Young within the district of Quebec," thus necessarily implying the request and consent of Sewell to this arrangement, and from the essential difference in wording of the last commission, necessarily implying also, on the part of the government, that the commission was so framed for the better security of the public, by rendering them jointly and severally responsible, and that the leave of absence to be granted as sworn to, was only granted upon such condition; otherwise no necessity for the revocation of the former commission existed. No severance, therefore, in the office has been or could legally have been established, and although the returns may have been made by Young alone, and judgment may have been rendered against him *nominatim* to pay the money, yet in the one case

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and in the other, as well as in the direction of the several writs issuing from the court, it is the office and not the person that is addressed; and I cannot but hold that the return of a writ addressed to the sheriff of Quebec, during the existence of the commission to Sewell and Young, jointly and severally, signed by either of them as sheriff, would have been equally valid and binding, as far as the rights and interests of the public were to be affected, however such returns might operate *inter se* in the arrangement of their private accounts. The authorities which have been cited at the bar establish, incontrovertibly, their joint and several liability, but it ought not in a question of this kind to escape observation that the affidavits do not negative either of the facts that Sewell, previous to his appointment, had not given good and sufficient security for the faithful discharge of his office, or that he was not entitled to one half the fees and emoluments of the office, notwithstanding his temporary absence. The present is not, strictly speaking, a criminal proceeding, but one well known in the law of this country by which all *depositaires des biens de justice* are liable to be coerced by the imprisonment of their persons. (a) From these considerations, as well as those which have been urged in support of the rule, I am of opinion that the rule for an attachment in this case must be made absolute, as well against Sewell as against Young, reserving to the former all such legal recourse as he may be advised to take against the latter, and all others in respect of the premises.

(a) La contrainte par corps peut aussi être prononcée pour dépôt nécessaire, consignations faites par ordonnance de justice, ou entre les mains de personnes publiques, tels que les greffiers, procureurs et huissiers. Ord. de 1687, tit. 34. Art. 4. L. C. Deniz. v. contrainte par corps.

TASCHEREAU, *Justice*. After what has fallen from the learned judges and the authorities they have cited, it is almost useless for me to add any thing upon this question. In the commission granted to hold the office of sheriff, the administration understood that the public should have its security, that the honor of government should be respected, and that the public service should be punctually performed. The commission of the sheriff is granted to two gentlemen, to enable them to act jointly and severally. The commission gave them the power to act thus, so that the ministerial act of both became the act of each of them, and the ministerial act of each of them became the act of both and of each of them. They might act severally so that the public service should not suffer from the absence or sickness of one of them, but the responsibility of both remained the same. It was not in the power of either of them to screen himself from that responsibility by any misfeasance, or nonfeasance, on his part, such misfeasance or nonfeasance might subject him to a penalty, but could not shelter him; for he could derive no advantage from his own fault. Although they might make, as between themselves, any arrangement they thought proper respecting the discharge of the duties of the office, or the partition of its emoluments; they had no power to make any prejudicial to the public service, or in any way diminishing their joint and several responsibility towards the public. I do, therefore, consider it but just that they be held jointly and severally responsible towards the public. The respectable person who is the subject of this discussion, although none can impute to him

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any intention of depriving the public of their rights, cannot, for all that, equitably lay any claim to set aside his responsibility. It appears by the documents before us, that it was merely for his own convenience that the commission of an indivisible office was given to him, and to another, in this manner. It has not been proved that he was not to have any share in the fees; nor has it been proved that it was against his consent that he was joined with the other in the commission, on the contrary every thing in the proceedings bears evidence that his own interest alone was contemplated, and that the commission would not have been issued in this way had it not been for his own personal security. He committed an error in not taking proper security from his co-sheriff, and allowing the latter to act solely; but the right of the public, founded as it is in justice and equity, cannot be thereby impaired. However hard the circumstances of the particular case may be, he is responsible for the money which his partner has had in his hands, even as much as if it had been in his own, and there remains to him his recourse against that partner only. I had doubts whether the parties ought not to have proceeded by way of action rather than by an attachment, seeing that this last mode of proceeding has in it some features of a criminal one; but it must be taken for granted that this court depended on him as well as on the other for the execution of its process, and he having disobeyed the court, the remedy is by the summary process of attachment. Possessing that power, and its exercise becoming necessary for rendering justice to an individual, from whom the use of his money

is unjustly withheld, we cannot do otherwise than grant  
an attachment against both parties.

Rule absolute. \*

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ALEXIS DUROCHER AND OTHERS.....*Appellants:*
and
BENJAMIN BEAUBIEN AND LOUIS GUY...*Respondents.*

13th May,
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THE question in this case was whether by the law of Canada, as it now stands, a minor of the age of twenty could bequeath personal property to a tutor. The appellants had originally obtained a judgment in their favor, in the Court of King's Bench at Montreal, which was reversed by the Provincial Court of Appeals.

A minor, of the age of twenty, can bequeath personal property to a tutor.

*Master of the Rolls.*—By the article 293 of the *Coutume de Paris*, it is clear that persons of the age of twenty could bequeath their real or personal property ; it is also manifest and clear, by the common law, that they could not bequeath to guardians or persons being in that relation by which their confidence might be abused by undue influence ; and if it was necessary to decide this question by the law of France, notwithstanding the arrêt of 1624, which has

\* See Com. Dig. Officer. (A. 1.) (B. 1.) (B. 7.) (B. 11.) Ib. tit. *Prerogative*, (D. 37.) 1 Salk, 166.

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been cited, it would possibly be the duty of the council to send a question to a French lawyer, with respect to the exception stated in that arrêt, but it appears to their lordships, that the law of France is not to govern this case but that it must depend upon the law of Canada as altered by certain statutes that have been referred to.

Upon a former occasion the lords of the council were of opinion that the statute of 14th, Geo. III. was meant merely to extend the subject over which the devisor had rights and did not affect in any manner the devisee : from what has passed to-day they are confirmed in the opinion they then formed upon the subject. The question then is what was the view of the provincial statute of 41st, Geo. III., which states, that doubts and difficulties had arisen with respect to the construction of the statute 14th, Geo. III. Those doubts and difficulties could only have been whether that statute did or did not mean to enlarge the capacity of the devisee, and not only to enable the person by his will to give property he was not before capable of devising, but whether it did not mean that he could give to persons to whom by the law of France he could not devise ; and the object of that statute when we come to read its enactments is undoubtedly meant to remove in practice that doubt and difficulty, and to make a new direct law upon the subject, and for the very purpose of enlarging the power of the devisee, the words are, " that it shall and may be lawful for all and every person or persons of sound intellect, and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the

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same be made by a husband or wife in favor of each other." Now the husband and wife could not before this law according to the *Coutume de Paris*, devise to each other in favor of one or more of their children as they then might ; and before this law they could not make an unequal distribution of their property between their children, except to a certain limited extent, and that proportionate inequality was limited. It proceeds to say they shall devise as they see meet " to any person whatever ;" therefore by this statute they enlarge the capacity of the devisee in favor of the husband and wife and of children in favor of *qui que ce soit*. Those words are certainly extensive and we find in the statute no subsequent words that enable us to give those words a limited meaning. Taking them, therefore, according to their common sense, this act would sanction a devise to any person, although previous to the passing of the act such person was prohibited by the law of France from receiving the benefit of such devise, and we are to come to the conclusion upon this statute, that the incapacity of the guardian and the incapacity of other persons who stood in the same situation with the guardian, was by the statute removed, not being able otherwise to give any effect to those words I have already referred to.

The remaining question is, what is the sense of the terms, " Toutes personnes saines d'entendement âgées et usant de leurs droits." Now, " usant de leurs droits" is of age to exercise their legal rights, and must necessarily, therefore, have relation to the property in respect of which they are about to exercise their legal rights. Now the property here in



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respect of which the devisor was about to exercise her legal rights, was moveable property : she was of age to exercise the legal rights with respect to moveable property, when she attained her age of twenty years, the conclusion necessarily follows that the incapacity of the guardian being removed by this statute, this lady has exercised her legal rights in favor of the guardian. The decree, therefore, of the Court of Appeals must be affirmed.

The judgment of the Court of Appeals was accordingly affirmed with £50. sterling costs.

Counsel for the appellants, the *Solicitor General* and *Campbell*, for the respondents ; *Brougham* and *Coltman*.

### CHASSEUR *against* HAMEL.

20th June,  
1828.

An act declared by the Legislature, generally, to be temporary, has no more than a temporary effect. Yet a temporary act may repeal a permanent statute if the intention of the Legislature to effect such a repeal be manifest.

**T**HIS was an action for a trespass or *voie de fait*. The declaration stated, that the defendant entered into the plaintiff's house, and seized and sold certain articles of moveable property belonging to the plaintiff, without any lawful authority ; and, therefore, he prayed compensation in damages. The defendant by a peremptory exception justified the entry, seizure and sale of the property in question, under the authority of a judgment, awarded by a militia court martial, against the plaintiff, for a fine of ten shillings, incurred un-

der and by virtue of the provisions of the ordinances of the 27th Geo. III. cap. 2, and 29th Geo. III. cap. 4, for a breach of duty. To this justification the plaintiff demurred.

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In the year 1787, a permanent militia law was passed, (27. Geo. III. cap. 2.) intituled, "an ordinance for better regulating the militia of this province, and rendering it of more general utility towards the preservation and security thereof." In 1789, another ordinance, (29, Geo. III. cap. 4,) likewise a permanent law passed, amending the former. The statute 34th, Geo. III. c. 4, intituled, "An act to provide for the greater security of this province, by the better regulation of the militia thereof, and for repealing certain acts, or ordinances relating to the same" repealed the above mentioned ordinances, but enacted, "that this act should be and continue in force from the passing thereof, until the first day of July in the year of our Lord 1796, and no longer." By the statute 36th, Geo. III. c. 11, the last mentioned temporary act was amended and continued to the first day of July, 1802. The next statute upon this subject was the 43rd, Geo. III. c. 1, containing various provisions in relation to the militia and repeals the above mentioned two temporary statutes: its duration was limited to the first day of July, 1807. The 53rd section repeals the ordinances above mentioned, enacting, "that from and after the passing of this act an ordinance passed in the 27th year of His Majesty's reign, intituled, &c.; also, another ordinance passed in the 29th year of His Majesty's reign, intituled, &c.; and also an act of the Legislature of the province passed in the 34th

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year of His Majesty's reign, intituled, &c. ; (viz., the 34th, Geo. III. c. 4. ;) and also another act. passed in the 36th year of His Majesty's reign, intituled, &c. ; (viz., the 36th, Geo. III. c. 4.) should be and were thereby repealed." In the last clause of this statute it is enacted, " that this act shall be and continue in force from the passing thereof, until the " first day of July, which will be in the year of our " Lord 1807, and no longer." This last mentioned statute having expired was revived by the 48th, Geo. III. c. 3, from the passing of the act on the 11th of April, 1808, and continued until the 1st of July, 1810, and from thence to the then next session of parliament. On the 21st March, 1811, by the act of the 51st, Geo. III. c. 9, it was further continued till the 1st of March, 1813, thence by the statute 52nd, Geo. III. c. 1, until the 1st of July, 1814. Having again expired it was revived by the statute 55th, Geo. III. c. 1, from the passing of the act on the 8th March, 1815, and continued until the 1st of May, 1816, and having again expired it was revived by the statute 57th, Geo. III. c. 32, from the passing of that act on the 22nd March, 1817, and continued until the 1st of May, 1819, when it was further continued by the 59th, Geo. III. c. 2, until the 1st of May, 1821, thence by the statute 1st, Geo. IV. c. 4, until the 1st of May, 1823, thence by the statute 3rd, Geo. IV. c. 28, until the 1st of May, 1825, thence by the statute 5th, Geo. IV. c. 21, until 1st May, 1827, and no longer.

The *Attorney General* having been heard for the defendant,—*Bedard* of Counsel for the plaintiff, not appearing in support of the demurrer,—the Judges delivered their opinions *seriatim*.

SEWELL, CH. J. This cause has been heard upon the pleadings, and the question submitted to us is whether the justification be a sufficient bar to the action if the matters of fact stated in the plea be true? and this turns entirely upon the enquiry whether the militia ordinances passed in the 27th and 29th Geo. III. be or be not in force.

These ordinances were passed by the governor and Legislative Council, under the Quebec act, before the establishment of the present constitution, and were permanent acts. But by the provincial statute 34th, Geo. III. cap. 4, they were repealed in these words: "And be it further enacted, that from and after the passing of this act, an ordinance of the late province of Quebec, passed in the 27th year of His Majesty's reign, intituled, &c. and also an ordinance passed in the 29th year of His Majesty's reign, intituled, &c. shall be, and they are hereby repealed." The provincial statute 34, Geo. III. cap. 4, was not, however, a permanent act: it was a temporary act in consequence of the 35th section, which is in these words: "And be it further enacted, by the authority aforesaid, that *this act* shall be and continue in force from the passing thereof, until the 1st day of July, which will be in the year of our Lord 1796, and no longer." And from hence has arisen the doubt whether the ordinances repealed by this statute were repealed permanently, or temporarily. I admit the principle that a temporary act may repeal a permanent statute; but to effect such a repeal, the intention of the legislature to do so, should, in my opinion, be manifest, for *prima facie*, an act which is declared by the legis-

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lature *generally* to be temporary, ought to have no other than a temporary effect. "If," says Mr. Justice Bayley, speaking of the usual clause of continuance in temporary acts, in the case of the *King v. Rogers*, (a) "*this act mean the whole of the act, then there is an end of the question. And I consider it as relating to the whole act; and after the time limited by the act for it to have effect, I consider the question the same as if that act were no longer to be found in the statute book.*" If the present case had stood upon this ground, I should have thought it to be a case in which the intention of the legislature to repeal permanently, was particularly required to be manifest upon the face of the statute; the consequence of a permanent repeal of the ordinances would have been to leave the province, its government and its inhabitants without the protection of a militia, and so far in a defenceless state, in the immediate vicinity of a foreign dominion; and to presume such an intention in the legislature by mere construction, is that which, in my opinion, could not be done. But the case stands upon better ground, namely, the construction of the legislature itself as to the effect of the 34th of Geo. the III. cap. 4, upon the ordinances which is expressed in the subsequent statute of the 43d Geo. III. cap. 1, sec. 53. To explain this I must observe that the 34th Geo. III. cap. 4, was continued by the 36th Geo. III. cap. 1, section 53, to the first of July 1802, and from thence to the end of the then next session of the provincial parliament; both these statutes, however, were repealed by the 53d section of the 43d Geo.

(a) 10 East's R. 575.

III. and to prevent the operation of the ordinances of the 27th and 29th of Geo. III. which, in consequence of this repeal of the statutes, would have revived if their repeal was temporary. They (the ordinances) by the same 53d section, *were again repealed* during the continuance of the 43d Geo. III.; and this clearly shews that the previous statutes and the suspension of the ordinances which they contained, were considered by the legislature to be co-equal in their duration, and consequently that the original intention of the legislature was to effect a temporary repeal of the ordinances, and no more. Had it been otherwise, and their original intention had been to effect a permanent repeal, there would have been no necessity for a second repeal.

It will be admitted that the legislature is the best interpreter of its own intentions and of its own acts; and as no alteration has been made in any statute subsequent to the 43d Geo. III. which bears upon the question now before us, and the original repeal of the ordinance was temporary and not permanent, we are of opinion that upon the expiration of the last statute 5th, Geo. IV. cap. 21, on the 21st of May 1827, the ordinances revived, and have since continued to be and still are in force.

KERR, *Justice*. Since this question came first to be mooted I never entertained the least doubt upon the subject. It is entirely a question of construction, that is, whether the probationary statute 34th Geo. III. cap. 4, and the subsequent experimental acts did, or did not, operate a permanent repeal of the provincial militia ordinances? The very preamble of the 34th of the late King, shews the anxiety of the legislature

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to provide for the protection and security of the province; and that it considered a well organized militia as the best means towards these objects. The words in the preamble are, "*Whereas a respectable militia, established under proper regulations, is essential to the protection and defence of this province.*" The same words are to be found in the next, and I believe in every succeeding temporary act relating to the militia; and are we, in the absence of any express enactment, to presume that the legislature intended, by the clause of repeal in these temporary statutes, to withdraw from the province that protection and security which a militia is calculated to afford? There is not only an absence of a plain and clear declaration of the intention of the legislature that these ordinances should be for ever repealed; but a presumption of the strongest kind, derived from the words of the temporary acts to the contrary. There is another circumstance which has very great weight on my mind, derived from the civil law of the country. Here the militia are, in some respects, ministers of justice, adding strength to the civil arm, as well as a military force for its defence; and can we presume that the legislature should be so wanting to the interest of their fellow-citizens, as to meditate the depriving the civil magistrates of their support. The authority of the *King v. Rogers*, is to my mind conclusive, and I am of opinion that judgment should be entered for the defendant.

BOWEN, *Justice*. I also heartily concur in the result of the opinion just delivered by the learned judges who have preceded me, although when the revival or non-revival of the militia ordinances first came under consideration in another place where I have the honor

to hold a seat the opinion which I then entertained was different.—This however proceeded from my having overlooked the second repeal of these ordinances contained in the 53d section of the statute 43 Geo. III. c. 1, and having considered the question solely upon the words of repeal as contained in the first statute 43 Geo. III. c. 4. The latter is intituled “An Act to provide for the greater security of this Province by the better regulation of the Militia thereof, and for repealing certain acts or ordinances relating to the same.” The preamble recites that “a respectable Militia under proper regulations is essential to the protection and defence of this Province, and the laws now in force are inadequate to the purposes intended.” The 31st section then enacts “that from and after the passing of this act (March 1793,) an ordinance of the late Province of Quebec, passed in the 27th year of His Majesty’s reign, intituled “An ordinance, &c., and also an ordinance passed in the 29th year of His Majesty’s reign, intituled “An act or ordinance, &c. shall be and they are hereby repealed.” And by the 35th section it is enacted “that this act shall be and continue in force from the passing thereof, until the 1st of July, 1796, and no longer; provided always that if at the time above fixed for the expiration of this Act, the Province shall be in a state of war, invasion or insurrection, the said act shall continue and be in force until the end of such war, invasion or insurrection.” What may have been the intention of the Legislature in any case can only be collected from the language used by it in its enactments, and in every such case it becomes a question of construction as to

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what the Legislature really intended. It is a clear rule that by the repeal of a repealing statute, the original statute is revived, for by so doing the Legislature declares that the repeal shall no longer exist; and it is the same thing if the repealed law itself provide that the repeal shall be only temporary. But it is not true as has been asserted, that a perpetual law cannot in any instance be repealed by a temporary one; for it is an undoubted principle in law, that a statute, though temporary in some of its provisions, may have a permanent operation in other respects. This point came under discussion in the Court of King's Bench in England, in 1803, (a) when the question was whether the statute 26th Geo. III. c. 108. sec. 27, which repealed the 19th Geo. II. c. 35, having itself expired at the end of the Session of Parliament after June, 1795, the 19th Geo. II. did not revive;—and Lord *Ellenborough* in delivering the opinion of the Court, said “that “would not necessarily follow, for a law though temporary in some of its provisions, may have a permanent operation in other respects. The statute 26th Geo. III. c. 108, professes to repeal the 19th Geo. II. absolutely though its own provisions which it “substituted in the place of it were to be only temporary.”

With a view to the construction for which I formerly contended, it may not be altogether unprofitable to compare the words of repeal as contained in the 26th Geo. III. cap. 108, with the words of repeal in our provincial statute to which I have already referred,—“And be it further enacted by the authority afore-

(a) 3 East's R. 206. *Warren v. Windle*.

“ said, that this act shall commence and take place on  
 “ Monday the 24th of June 1795, and from thence to  
 “ the end of the then next session of parliament,—and  
 “ that from and after the said 24th of July 1786, the  
 “ said recited acts of the 19th, 23d, 24th, 31st and  
 “ 32d, Geo. II. and of the 6th and 21st years of the  
 “ reign of his present Majesty, *shall be, and is, and*  
 “ *are hereby repealed.*” Words of repeal, which ac-  
 cording to my construction of them, are in no wise  
 more absolute than those contained in the provincial  
 statute 34th Geo. III. cap. 4. The use of the words  
 “ this act,” in the foregoing clause affords an answer  
 to much of the argument founded upon the case of  
 the *King v. Rogers*, which has been relied on as de-  
 cislve of the question under consideration. That case  
 so far, in my opinion, from overturning the principle  
 for which I contended, goes directly to strengthen  
 and confirm it. Lord *Ellenborough* there said “ it is  
 a question of *construction* on every act professing to re-  
 peal or interfere with the provisions of a former law,  
 whether it operates as a total or a partial and temporary  
 repeal. Here the question is whether the provisions  
 of the statute 42, Geo. III. which was *originally* per-  
 petual, be entirely repealed by the 46th of the King,  
 or only repealed for a *limited time*. The last act re-  
 cites, indeed, that certain provisions of the former act  
 should be repealed; but this word is not to be taken  
 in an absolute, if it appear upon the whole act to be  
 used in a limited sense only.” I trust enough has  
 been shewn were it any longer an open question of  
 construction, or were it necessary to justify the opi-  
 nion formerly entertained by me of the subject, that

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the repeal in the statute of 1793, (34th Geo. III.) was then contemplated as an absolute repeal. But the same legislature having subsequently in 1803, (and it is upon this ground alone that I yield my former opinion to which I must still have adhered, whatever might have been the consequences,) taken from me the right to enquire at present, what might have been its true intention in 1793, by again repealing the ordinances in question; this legislative interpretation of the clause of repeal in the statute of 1793, must, therefore, have the effect to preclude me from putting any other or different interpretation upon the like words of repeal contained in the statute of 1803, which after being continued by various statutes, was suffered to expire on the 1st day of May 1827. The supposed trespass for which the plaintiff seeks to recover damages from the defendant in the present instance being acts done in pursuance of the revived ordinances, I am of opinion, with the other judges, that if proved, they do in law amount to a justification of the defendant.

TASCHEREAU, *Justice*. This case falls within the principle of the cases cited by the defendant. It is evident that there was no intention in the legislature to repeal permanently the militia ordinances, and that the words and good sense of the several statutes referred to require that construction. Therefore, judgment must be for the defendant.

ISAAC ROUSSE, *Ex parte*.

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29th July,  
1828.

**A** WRIT of Habeas Corpus was issued directed to the keeper of the common gaol of this district to produce the body of Isaac Rousse, and by the return it appeared that this individual was imprisoned under a commitment upon a conviction before two justices for selling tickets in and belonging to a foreign lottery.

The prisoner having been heard by his counsel the following opinion was given by

SEWELL, CH. J. The point submitted is distinct and single. If the statutes 9th, Geo. I. c. 19; and 6th Geo. II. c. 35, form a part of the criminal law of this province, there has been no assumption of jurisdiction on the part of the magistrates by whom the prisoner has been convicted of selling tickets "in and belonging to a foreign lottery," and consequently the prisoner must be remanded; for the question whether the conviction was regular, as to the course of proceedings had in obtaining it, must be settled by certiorari.

By the 14th, Geo. III. c. 83, the criminal law of England is declared to be the law of this province, "as well in the description and quality of the offence, as in the mode of prosecution and trial." A great portion of that law is of universal application and that portion is in force in this province; but other portions are merely municipal and of local importance

The statute 14th, Geo. III. c. 83, has introduced into this province that portion of the criminal law of England only, which was of universal application there, and not such parts as were merely municipal and of local importance.

By that statute, the 9th, Geo. I. c. 19, and 6th Geo. II. c. 35, which impose certain penalties, on persons selling tickets in a foreign lottery, have been made to form a part of the criminal law of Lower Canada.

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only, and these are not in force. The line between them, in the absence of positive enactments, must be drawn by the legal discretion of the judges as cases arise and call for decision, and "the inquiry," says Sir *William Grant* in the case of the *Attorney General v. Stewart* at the rolls, "will depend upon this consideration, whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation equally applicable, in any country in which the law of England obtains. (a) Now, gaming from its tendency to corrupt the morals of the people is considered by the law of England to be an offence. "Taken in any light," says Sir *William Blackstone*, "it is an offence of the most alarming nature," (b) and all lotteries, as a species of gaming, are declared by the 10th and 11th Will. III. c. 17, to be public nuisances. The statutes, therefore, which have been passed, prohibiting the establishment of offices for the sale of tickets and chances in foreign lotteries, and the sale of such tickets and chances, I cannot but consider as general regulations in furtherance of the laws against gaming, and as applicable in this province to the state and condition of the inhabitants as in England. The statute 6th, Geo. II. c. 35, after stating that the statute 9th, Geo. I. c. 19, has been found inadequate, enacts, "That if any person shall sell any ticket in any foreign lottery, and shall be convicted of the said offence before two or more justices of the peace, the person so convicted shall, *for every such offence*, forfeit the sum of £200, and be committed to the county gaol, there to remain

(a) 2 Merivale's R. 154.

(b) 4 Comm. 171.

without bail or mainprize for the space of one whole year, and from thence until the said sum of £200. so forfeited as aforesaid, shall be fully paid and satisfied." And the return to this habeas corpus is a commitment of the prisoner upon conviction, before two justices, of the offence above stated.

It has been argued that the conviction is not a criminal matter, but I cannot agree in this. By the mutiny act it is enacted, "that a soldier shall not be liable to be taken out of His Majesty's service by any process or execution whatsoever *other than for some criminal matter.*" In the case of *The King v. Bowen*, the defendant, on a charge of bastardy, was committed for refusing to enter into a recognizance to indemnify the parish, and the question before the court of King's Bench was whether this was a commitment for a criminal matter and the court held that it was, because incontinence is a crime though cognizable only in the ecclesiastical courts. (a) The present appears to me to be a stronger case than *Bowen's*, for here, to sell tickets in a foreign lottery is, by statute, declared to be an *offence punishable* by fine and imprisonment and cognizable before a criminal jurisdiction of two justices of the peace from whose judgment an appeal lies to the court of Quarter session. If I err in the opinion I entertain on this case I have the satisfaction of knowing that it may be brought before the Court of King's Bench where my error may be corrected.

Let the prisoner be remanded.

(a) 5 Term. R. 156. Ib. vol. 2, p. 270. *The King v. Archer.*

## ON APPEAL FROM QUEBEC.

THE ATTORNEY GENERAL pro Rege, *Appellant.*  
and

JANE BLACK,.....*Respondent.*

30th July,  
1828.

The crown can recover interest where a private individual would be entitled to it, as in an action for money paid under a written contract on account of a third person, in which it may be recovered from the date of service of process of the Court.

Where the greater rights and prerogatives of the crown are in question recourse must be had to the public law of the Empire by which alone they can be determined: but where its minor prerogatives and interests are in question they must be regulated by the established law of the place where the demand is made.

THE question in this case was whether the crown could recover interest, and from what period, on a debt which it had guaranteed to Messrs. McTavish & Co. and which it afterwards paid, on the default of the late Mr. Goudie, who had become bound to pay the same under a deed of lease of the king's posts, made to him by the crown.

REID, CH. J. Some discussion has arisen, as to the law that ought to govern the case, as it brings in question a right claimed by the crown,—and it has been contended on the part of the respondent, that the public law of England, is the only rule we can adopt by which the rights of the crown can be maintained, and that according to this law, the crown is not entitled to the interest here claimed, inasmuch as the right of the crown to demand interests or costs, is limited to such cases as are specially provided for, and not allowed in all cases as between subject and subject—that the debt here demanded is *sui generis*, and does not fall within any of those cases where interest is allowed, it not being a debt due by a public accountant, not stipulated by any obligation or specialty, nor even certain or liquidated.

We take the principle to be, that in all cases where the greater rights and prerogatives of the Crown come

in question recourse must be had to the public law of the Empire, as that alone by which such rights and prerogatives can be determined.—But the debt here demanded is a *minor* right, founded on a particular contract made between the crown and the late John Goudie, by which he undertakes, for the considerations therein mentioned, to pay this debt on the behalf of the crown to Messrs. McTavish & Co. This has more the appearance of a private contract, than of a debt growing due to the crown out of its public revenues.—Were the crown even entitled to exercise a stronger recourse than that given to the subject for the recovery of its right in this case, still it is competent to the crown to waive this right, and to adopt the recourse given to the subject ; in which case it appears consistent with reason, that it ought to obtain the same justice as the subject. This principle the law of England seems to recognize, for by the stat. of 39. H. 8. ch. 39. s. 54. it is enacted, “ That the king in  
 “ all suits thereafter to be taken, in or upon any obli-  
 “ gations or *specialties* made, or hereafter to be made  
 “ to the king, or any to his use, shall have and receive  
 “ his just *debts, costs* and *damages*, as other common  
 “ persons used to do in suits and pursuits for their  
 “ debts.”—The proceeding here is founded upon that principle, being such as one subject might exercise against another. It is however unnecessary to consider whether the debt here demanded be founded on an *obligation* within the purview of this statute, as in the decision of the question before us, we must be guided by the laws of the country : the rule we have to follow, is that laid down by *Chitty*, where he states  
 “ That in the colonies and plantations, the minor pre-

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“rogatives and interests of the crown must be regulated and governed by the particular, and established law of the place where the demand is made,” and accordingly,—“where peculiar laws and process exist, as in Guernsey and Jersey, the king himself in seeking to recover his own debts therein, must resort to such laws for redress”—which alludes not merely to the form of process to be used, but also to the extent of recovery to be had, and is conformable to what Gail, and other civil law writers lay down on the subject.—Now according to the principle of law in this country, the rights of the crown are admitted by all writers to stand on at least as good a footing as those of the subject, and in regard of the interest to be allowed on debts accruing to it, the maxim is—“*Le fisc s'en doit tenir au droit commun pour les intérêts*”—applying this maxim to the case before us, the crown is entitled to claim interest from the day of the *demande en justice*, (a) that is from the fourth of July, 1825, but we cannot extend it further, as there is no specific demand, or count in the declaration, on which a judgment for any greater interest can be supported.

(a) By the 60th art. of the ordinance of Orleans it is enacted that “contre les condamnés à payer certaines sommes de deniers due par cédula ou obligation seront adjugés les dommages et intérêts requis pour le retardement du payement, à compter du jour de l’assignation qui leur aura été faite.”

## ON APPEAL FROM QUEBEC.

HENRY JOHN CALDWELL.....*Appellant.*  
 and  
 THE ATTORNEY GENERAL *on the behalf of our Sovereign*  
*Lord the King*.....*Respondent.*

30th July,  
 1828.

**T**HIS was an appeal from a judgment of the Court of King's Bench at Quebec, upon an opposition made by the appellant, to the sale of the Fief and Seigniory of *Lauzon*, seized and taken in execution on the 17th day of March 1826, as belonging to the Honorable John Caldwell, at the suit of the *Attorney General* on behalf of His Majesty. The grounds of the opposition were, that the late Henry Caldwell in his life time was proprietor of the said Seigniory, and that he departed this life, on the 28th day of May 1801, leaving the same in his succession and estate. That by his last will and testament *olographe*, wholly written and signed by himself, and which had been duly proved before the Honorable Jenkin Williams on the 2d day of June of the same year, he did give and bequeath all his estates real and personal to his son John Caldwell, (being his only son,) subject to such limitations as were provided in the said will, and did declare it to be his will that his grandson Henry, (the opposant) or such other of his grand sons, to be born in wedlock, whom the said John Caldwell might consider as most deserving, *should inherit* the said Seigniory of *Lauzon* entire and without any diminution. The appellant therefore prayed that the said Seigniory might be de-

It is essential to the validity of a devise of real estate that the *holographe* will, in which it is contained, should be entirely written by the testator, and closed by his signature.

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clared not to belong to the said John Caldwell, but that in virtue of the bequest above mentioned the same might be declared to be the rightful property of the opposant, or of such other son of John Caldwell, thereafter to be born in wedlock, whom he might consider the most deserving: that the seizure might be declared void, and *mainlevée* granted thereof. To this opposition were pleaded, on behalf of His Majesty, 1st the general issue; 2d, a general demurrer, and 3d, peremptory exceptions. In the latter it was alleged that the pretended substitution or entail, in the said opposition mentioned, was not within six months after the decease of the late Henry Caldwell, or at any other time, published or enregistered in the royal court nearest to the domicile of the said Henry Caldwell, at the time of his decease, being the court of King's Bench for the district of Quebec, or in any other court, as required by law. The opposition was subsequently amended but the pleadings remained the same. Issue having been joined upon these pleadings, it was agreed between the parties that the parol evidence which had been legally adduced in the same cause, upon an opposition of William Meiklejohn in his capacity of tutor to the substitution or entail alleged to have been created by the will above mentioned, should be taken to be evidence upon the opposition of the appellant. The will referred to in the opposition when produced, commenced as follows: "In the name of God, Amen. I, Henry Caldwell, of Belmont near Quebec, &c." It was proved to have been wholly written by the late Henry Caldwell, but his signature was not subscribed to it, and the will had no date. The parties having been heard, the Court of King's Bench pronounced its

judgment, on the 13th day of June 1827, in the following terms: "considering that the will of the late  
 " Henry Caldwell, Esquire, in his lifetime Receiver  
 " General of this province, was not executed according  
 " ing to the laws of Canada, or to the form prescribed  
 " by the laws of England, so as to pass the estate or  
 " Seignior of *Lauzon*, it is adjudged and declared  
 " that the opposition of Henry John Caldwell, in this  
 " cause fyled, be, and the same is hereby dismissed." From which judgment the present appeal was instituted.

The parties having been heard by their Counsel, as well upon the opposition of Meiklejohn, on which a similar judgment had been pronounced, as upon that of the appellant, the following opinion of the court was delivered by

REID, CH. J. To the oppositions in this case, different pleas have been made, and it has been objected on the part of the respondent, 1. That the will in question was without legal effect or validity, the same not having been written and signed by the late Henry Caldwell. 2. That the devise therein and thereby made, containing a substitution in favor of the opposants, but not having been published in the King's courts, nor entered in the public registers thereof, as by law required, the devise in question was, therefore, wholly null and void. On these points the Court of King's Bench, after hearing the parties and the evidence by them adduced, adjudged that the will in question not having been made and executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England, was not sufficient to pass the estate or seignior of *Lauzon* to the opposants, and therefore

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dismissed the oppositions with costs.—This case has been fully and ably argued, and after giving all due consideration to its importance, we come now to determine, whether the judgment appealed from is warranted by law, or whether it ought to be reversed. The first point to be considered is, whether the writing produced and proved, as the last will and testament of the late Henry Caldwell,—the same having been written by him, but neither dated or signed, that is, subscribed by him,—can nevertheless be considered under the laws of the country as a good and valid holograph will sufficient to vest in the opposants the right they claim. Among the arguments adduced in support of the will it has been strongly urged, that as the subject in this country is at liberty to adopt any form in making his will, known either by the laws of Canada or by the law of England; and as the form here followed, is one known by the law of England, in as far as regards the disposition by will of chattel interests, and no distinction being made or known by the laws of Canada as in England, between the form of a will of real, and a will of personal property, (any form when legal, being sufficient to pass all kinds of property by the laws of Canada,) the form used by the late Henry Caldwell, being recognized here as a legal form, must necessarily have the effect to pass the real as well as the personal estate, inasmuch as the effect of such will must be determined by the laws of Canada, where the property lies.—That although the will in question has not been subscribed or closed by the *signature* of the testator, yet his name being written by him at the commencement of it in these words, “*I, Henry Caldwell, Esquire, of Belmont, &c.*” it is a

sufficient signing, and so held by the decisions of the courts in England, on the stat. 29th C. II.—Consequently the will so signed must be held sufficient to operate the devise contended for, by the laws of Canada. This argument however cannot be admitted as correct in principle, for if we consider the British statute of the 14th of the late King, (commonly called the Quebec Act,) it is evident that the forms of wills thereby introduced, were the forms which in England were admitted and known as having the effect and operation of a sufficient conveyance and disposition of the estate of the testator.—These were extended to this colony, no doubt, for the benefit of such of the King's subjects settled in it, as might be unacquainted with the forms then followed under the French laws, in order to facilitate them in the disposition of their property, and to enable them to transfer it by will in Canada as easily and effectually as they could have done in England. It certainly cannot be inferred from this statute, that the form of a will operating only as a bequest of a chattel interest in England, should have a greater effect in Canada than it had in England, or that it should operate a devise of the realty in Canada, where by the laws of the country it was insufficient for that purpose ; the words of the statute are very clear and plain :—" That every person having lands or goods in the province, or who has a right to alienate the same in his life-time by deed of sale, gift or otherwise, may devise or bequeath the same at his or her death by his or her last will or testament, such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England."—The plain meaning

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of which is, that every person desirous of devising his lands in Canada by a will in the English form, must follow that form in such manner as would operate a devise of land in England, and the same thing in regard of chattels.—It never was meant or intended by this statute that the forms known by the laws of the two countries could be so amalgamated, that a person might adopt in part the form of a will recognized by the law of the one country, to give effect to an insufficient form under the laws of the other, for this would be adopting a form unknown to the laws of either. The distinction is sufficiently marked, that the forms of the one country or of the other must be followed throughout, and the form adopted must be efficient according to the law of that country from which it is taken,—the forms of the one country are introduced, the forms of the other are confirmed, as two distinct modes for the conveyance of real property by will.—The will in question therefore must in its form be such, as by the laws of England or by the laws of Canada will operate a devise of the real estate. Now, according to the laws of England, it must be admitted on all hands, that this will can have no effect in devising the realty, we must therefore consider it, in point of form and effect, under the laws of Canada.

It is called an holograph will, and by the testimony adduced, appears to have been wholly written by the late Henry Caldwell, but is neither dated or signed by him, and on this account the objection appears to have been taken that it cannot in point of form be considered as a will, nor have any effect whatever under the laws of Canada. The rule of law, as established by the 289th article of the custom is—" *pour reputer un*

“ *testament solennel, est requis qu’il soit écrit et signé du testateur, &c.* ” :—This is the holograph will, and the two requisites in point of form are, that it shall be *written* and *signed* by the testator. Now, if we can find that by the decisions of the courts of justice, or by any interpretation had upon this article, the signing thereby required, has or can be construed in the same manner as it has been construed by the courts in England, under the stat. 29 C. II. we will certainly allow the full effect of such construction, and declare that the testator, by writing his name at the commencement of this holograph will, has thereby sufficiently complied with the law which requires “ *qu’il soit écrit et signé du testateur.* ” Among the commentators upon this article, little is to be found applicable to the question,—they, in general, assume the words of the law by saying, that the will must be written and signed by the testator, but as to the place where such signature should be affixed, it would not seem to have been considered by them as a matter of doubt or difficulty, so as to excite observation or comment; the few who have intimated any opinion on the subject, we shall have occasion just now to notice. The authorities cited by the appellants we have carefully examined, but they are far from establishing the principle contended for. The case cited from Denizart (*a*) is given by that writer as an authority to shew, that an holograph will, without *a date*, was not on that account null and void; but in regard of the *signature*, this case, rightly considered, seems to bear against the appellants, as it certainly implies that the signature there made,

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(*a*) Denizart v. Testament, No. 35.



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was the last act done by the testatrix, and in confirmation of all that had preceded it;—for, the signature of the testatrix after the words, “*c’est moi qui l’a cachetté en cire rouge et en chiffres,*” although the first thing seen on looking at the will folded up, was the last act done, and so far from being considered as the commencement of the act, it was the close and confirmation of it, and by the formality of sealing and signature, it was giving an approbation to the writing it enclosed, as effectually as if the signature had been attached thereto; but neither in this case, or in any to be found touching the execution of an holograph will, has it been held, that the name of the testator, written at the commencement of the will, has been considered as the signing of it.—It is true that in England the judges, by giving a great latitude to the words of the before mentioned statute, have held, that the writing of the name of the testator, at the beginning of the will, is to be considered as a sufficient signing within the intent and meaning of that statute, and it may therefore be asked, why the judges here cannot adopt the same favorable interpretation in regard of an holograph will made under the laws of this country, but this we are unable to do, and the strong reason against it is, that we have no witnesses here, as required by the British statute who can declare and testify to us, that the testator made and published this writing as his last will and testament, we are left in doubt as to the material fact, what was the intention of the testator respecting this paper, whether it contains all his dispositions, or whether it was meant only as a mere *projet* or instructions, whereby to draw a more formal instrument at

some future period. But such of the law writers who have touched upon the point, of what constitutes the execution of a will by the signature of the testator, and where that signature ought to be placed, put the question beyond all doubt. *Ferrière* lays down the general meaning of that word, he says, "Signature est la souscription, ou apposition de son nom au bas d'un acte, mise de son propre main." (a) *Pothier* in speaking of the *testament olograph*, says, "La signature doit être à la fin de l'acte, parcequ'elle en est le complément et la perfection." (b) *Ricard*, speaking of wills in general, says, "Quant au lieu où les signatures doivent être placées, il n'y a pas de doute qu'il y a obligation de les apposer à la fin de l'acte, et après qu'il est achevé, attendu que faisant foi par elles mêmes et servant de sceau à l'acte, elles ne peuvent point valablement être faites, que lors que l'acte est accompli." (c) *Bourjon* says, "C'est la signature à la fin du testament olograph qui en est le sceau," and in the note he adds, "En effet, c'est cette signature finale qui en est le sceau et sans laquelle il y a tout lieu de presumer que l'écrit n'est que le simple projet d'un testament." (d) A presumption, such as here alluded to, is in some measure confirmed by the evidence in this cause, that this paper writing was intended by the late Henry Caldwell, merely as the *projet* of a will;—we refer to the deposition of Mr. Têtu the notary; he says, that being at Belmont in the spring of the year, 1809, the deceased Henry Caldwell re-

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(a) Dictionnaire de Droit v. Signature. (b) Don. Test. ch. 1. art. 2. § 2. p. 299. (c) Tr. des donations entre vifs, vol. 1, No. 1531. p. 347.  
(d) Bourjon, vol. 2. p. 304, No. 6.

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quested of the witness to return there in two or three days, as he, Mr. Caldwell, was desirous to make his will, and after a little reflection he added, that in order to facilitate the witness in drawing the will, he would reduce his intentions into writing, and send for the witness at another day ; but the witness was not again sent for before Mr. Caldwell died. This presumption is also further strengthened, by looking at the existing will of the late Mr. Caldwell, regularly executed before the same notary, and leads to a belief, that the paper writing in question without *date* and without *signature*, was an unfinished act, and intended only as instructions for drawing a more formal will, in the manner he had heretofore done. But these presumptions whether well or ill founded, are of little moment here, as they cannot affect the principle of law. (a)

In addition to the authorities just cited, we would also refer to the opinion of a celebrated writer of the present day in France, Mr. Toullier, not that we consider his opinion as an authority to ground our decision, but as he has written on the same question, on a law the same in principle as the 289th article of the custom of Paris, with this difference only, that by the law on which he writes, the will must be *dated*, as well as *written* and *signed* by the testator ; we give his opinion, merely to shew the uniformity of jurisprudence on this point, as well under the former system of law in France, as at the present day. He says, " C'est la signature qui rend parfait le testament " olographe, elle seule atteste qu'il est l'acte propre

(a) *Griffin v. Griffin*, 4 Vez. 197.

“ du testateur, sans elle il ne seroit qu'un projet.” (a)  
 And he adds, “ La place de la signature n'est pas  
 “ variable et indifferente, comme celle de la date.  
 “ Cette place est marquée par la nature des choses,  
 “ elle est la marque de l'accomplissement de la vo-  
 “ lonté du testateur, et de la dernière approbation  
 “ qu'il donne à l'acte. Il est donc nécessaire que  
 “ toutes les dispositions du testament soient termi-  
 “ nées par la signature.” (b) From all the authori-  
 ties which have come under our notice, as well as  
 those cited, we are satisfied, that in order to render  
 a holograph will valid, it must be closed and con-  
 firmed by the signature of the testator, as constituting  
 the signing which the law requires. And we are  
 therefore of opinion, that the paper writing here  
 produced, cannot be received as the last will and  
 testament of the late Henry Caldwell.

There has been another point raised in argument,  
 of which we must here also take notice—which is,  
 that this holograph will, however insufficient in point  
 of form, yet having been confirmed by the defendant  
 who alone had an interest therein, and at a time when  
 there existed no claim against him by the crown, it  
 ought therefore to have the same force and effect, as  
 if it had been originally made in legal form. But the  
 court does not consider itself called upon to give any  
 opinion upon this question, however material it may  
 appear, as it is not raised by the pleadings in any  
 way to require, or warrant our decision thereon.  
 This was necessary, as the time when this confirma-

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(a) 5 Toull. des dispos. Test. p. 346, No. 372 and p. 349, No. 375.

(b) *Ib.* No. 375.

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tion was made, the mode and manner of making it, and the consequences to accrue therefrom, by giving legal operation to an instrument in itself of no validity, but which by means of such confirmation became effectual and binding, were matters essential to have been averred in the opposition and claim of the opposants, as upon all these matters of fact and of law, the crown was entitled to raise a contest and to be heard, but as nothing of this appears on the record, by which alone the court must be guided, in giving its decision, we cannot now take notice of this question. As to the other questions agitated on the pleas to these oppositions, they need not be noticed, the opinion we now hold as to the insufficiency of the will, rendering this unnecessary.

Judgment affirmed.

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CANNON *against* LARUE AND OTHERS.

20th October,  
 1828.

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 An action  
 of trespass  
 against a road  
 surveyor,—  
 who had acted  
 under a judgment of the  
 court of Quar-

ter Sessions,—for entering the plaintiff's close and destroying certain buildings must be brought within three months after the right of action accrued, as provided by the statute 36, Geo. III. cap. 9, § 76.

Such action may be maintained against persons, acting under the orders of the road surveyor, who do not plead a justification of their conduct.

THIS was an action of trespass for breaking and entering the plaintiff's close, and destroying a stable and other buildings. One of the defendants, Larue, pleaded in justification, that he had acted as road surveyor

under a judgment of the court of quarter sessions, homologating a *procès verbal* by which he was directed to open a public road through the ground on which the alleged trespass was committed. The other defendants pleaded the general issue only.

KERR, *Justice*. It has been contended by the Counsel of Larue; that this action should have been brought within three months after the cause of action arose, as provided in the 76th section of the 36th Geo. III. cap. 9, § 76, in default of which it could not be maintained. In answer to this objection, it is said that the magistrates, by ordering this road to be opened, had exceeded their jurisdiction, and in this respect the officer had acted not *virtute officii* but *colore officii*, and is not protected by this clause; and that this distinction in terms was taken by Lord *Kenyon*, as referred to in Tidd's practice. Now I take the distinction there made between *virtute officii* and *colore officii* to be no more than that when a magistrate,—in the exercise of authority,—the subject matter of which is within his jurisdiction, decides in a pure and upright mind, but is mistaken in his opinion, and orders an act to be done which exceeds his authority, he is excused, and all persons acting under his warrant. In the humane view of the law he then acts *virtute officii*. But when with a judgment knowing that the act was not within the scope of his jurisdiction, and a heart impure, he shall wilfully pervert the law to gratify private purposes, then the law considers him as having acted *colore officii*, and withholds from him its protection. If, indeed, it were otherwise the clause in the act would become of no use or avail; for, acting within the limits of his authority, and in strict observance of the powers granted, he would be as well shielded from the

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undue exercise of his jurisdiction as if no such clause had been inserted. So far as respects Larue it is unnecessary for us to enquire, whether, having obeyed the authority given to him by the Quarter Sessions, or if that court had abused its authority in ordering the street to be opened, whether the action should not have been brought against the magistrates, and not against him, (on both of which points I could have no difficulty in making up my mind.) I am of opinion that after the expiration of the three months this action cannot be maintained against the officer acting under the statute, and that, as regards him, the action must be dismissed. As to the two other defendants they stand in a different situation, for they have severed in their defence and have not pleaded a justification, as that they came in aid of the officer, but have rested their defence entirely on a general plea, whereby they have put in issue the commission of the trespass only, and this has been completely proved against them both. One of them, Mailhot, appears to have been an active instrument in demolishing the buildings; and although the other, Phillips, acted with more caution, yet we find him present countenancing the act of trespass: that his foreman assisted in it, and he himself sent for rum to be given to the men who actually pulled down the outhouses, and that the whole was done in an outrageous manner. It only, therefore, remains for the court to assess the damages, which all circumstances considered the court assesses at £50, and for this sum judgment (a) will be entered up against both of them with costs.

Vallières and *Scott*, for the plaintiff.—*Gugy*, *Romain* and *Smith*, for the defendants.

(a) Affirmed in appeal the 30th April 1830.

WILSON *against* KERR.9th Decr.
1828.

CERTAIN fees were paid by the plaintiff to the defendant, as judge of the court of vice admiralty for the province, in a suit lately pending before him for subtraction of mariner's wages, and this was an action to recover back the fees so paid, amounting to the sum of £15, for the express purpose of trying the defendant's right to exact them.

Willan, for the plaintiff, admitted that a court having jurisdiction over the subject matter or cause of action, has jurisdiction equally so over that which is necessarily incidental to it, but that the sum demanded ought not to be considered as costs of suit, but as a sum of money paid under the colour of fees to the judge himself, having no right to take such fees—1. Because, if the right exists at all, it must be founded either upon express enactment or immemorial usage, neither of which had been shewn. 2. Because by the provincial ordinance of the governor in council of the year 1780, a sum of £200 per annum was allowed to the then judge of the vice admiralty, in lieu of fees; and 3. Because it is in evidence that the defendant receives the annual salary of £200, as judge of the vice admiralty court.

Primrose, for the defendant, said that this court could not entertain the question inasmuch as it relates, exclusively, to another court, the vice admiralty having competent and original jurisdiction over the subject matter before it, viz, a suit for mariners's wages, to

The court has no jurisdiction in an action against a judge of the court of vice admiralty to recover back money paid to him as fees in a suit determined in that court, but the remedy is by appeal to the high court of admiralty in England, or to the King in his Privy Council.

Semble, That the right of the judge of the vice admiralty, to exact fees, is of an immemorial usage introduced into this country after the conquest.

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which the question of costs and the amount thereof was purely incidental, and could only be corrected by an appeal from the judgment to the high court of admiralty in England, or by a petition to the judge of the vice admiralty to revise the taxation.

By the consent of parties the court pronounced its judgment in vacation.

BOWEN, Justice. The defendant has put upon the record his commission under the great seal of the high court of admiralty in England, which delegates the necessary power to him as such judge, with the right of taking fees as exercised, not only by the high court of admiralty, but until very lately by the judges in every other court in England. It is in evidence that upon the conquest of Canada, the first governor General Murray, in 1764, by letters patent, appointed Mr. *Potts*, judge of the vice admiralty for the province of Quebec, and granted the office to him with the right to take and receive all such fees and emoluments as any other court in the colonies took, or of right ought to have taken in any of them. Here then *in limine*, we find, that on the first introduction of the office into Canada fees were granted to the judge. Again, in September 1769, in the commission issued by the governor to Mr. *Johnson*, we find these words, "with power of taking and receiving such salary as should hereafter be appointed, and in the meantime to take all such profits, advantages and emoluments to the said office belonging, with such fees as should be approved by His Excellency. The ordinance of 1780, for regulating the fees of various offices in the province, which the plaintiff has much relied on, was merely temporary, and expired long before the appointment

of the defendant to be the judge of the vice admiralty, it contained, however, a legislative recognition of the right to fees by granting to the then judge, a salary of £200 *per annum* in lieu of fees. The ancient registers of the court also prove that the former judges did receive fees, in one of them we find a bill porrected in a suit for seamen's wages, in which the following item was inserted by the proctor: "Paid to the judge, £4 19s." Now as this court, the King's Bench, has no appellate jurisdiction over the decisions of the vice admiralty court, we cannot try that which the judge has done in the exercise of his office, in any matter within the scope of his jurisdiction, (a) although he should have proceeded erroneously. The case of *Ackerly v. Parkinson*, (b) wherein it was held "that an action on the case is not maintainable if the court has a general jurisdiction over the subject matter," is directly in point. Again, it is distinctly stated in *Blackstone's Commentaries* (c) that when the admiral's court has jurisdiction over the original cause of action, it has jurisdiction also, over all consequential questions, although properly they may be determinable at common law. We know not under what circumstances the salary of £200 *per annum* is paid by His Majesty to the present judge, but this we know, that the warrant does not express it to be in lieu of fees. This action must, therefore, be dismissed, and the plaintiff left to his remedy by an appeal from the court of vice admiralty to the high court of admiralty in England, if he see fit, or he may appeal from this judgment to the King in council.

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(a) Wood's Institutes, 498.—1 Chitty's Pleading, p. 66.
 (b) 3 Maule and Selwyn, 424. (c) Vol. 3, p. 188.

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TASCHEREAU, *Justice*. We are not called upon to determine whether it is, or is not expedient that the judge of the vice admiralty should receive fees, this belongs to the legislature, but to decide according to the law as we find it, whether it be good or bad. The establishment of the court of vice admiralty was a consequence of the conquest. There has been no particular statute, either of the imperial parliament or of the provincial parliament, specially providing for the establishment of this court in Canada. The office of judge of this court cannot be considered a new office; but the court and its officers are established in this country upon the same footing as in England, with the same powers, the same privileges and the same rights. Amongst these rights is the right of receiving fees, established by an immemorial usage, equivalent to a positive law, which usage has been recognized and acted upon in this country. This usage in England is more ancient than the statute of Edward the III. which prohibits the taking of fees without the authority of parliament, after the making of the statute, but does not revoke the laws and usages previously established. This usage must then be considered as one established by competent authority; it has been followed in the colonies, and has been introduced into this province with the court of vice admiralty. It is a law from which we have no right to derogate, unless authorized by an act of parliament. Now, there is no law in force which derogates from this usage. It is true that there was an ordinance which derogated from it for a time, but the legislature has not thought proper to continue this temporary act, it is not for us to supply this. The ordinance, then, so far from being repugnant to the receiv-

ing of the fees, formally recognizes the usage under which they are received. The Sovereign, in his commission conferring the office of judge, grants it with all the fees lawfully appertaining to it. We cannot of ourselves take them from him. The question of fees is accessory to the principal litigation, and is, therefore, of the jurisdiction of the court of vice admiralty and not of this. If the judge has erred, it is only by an appeal that his error can be rectified. If this court could at all interfere in this matter, at utmost it could only be when the judge received fees not sanctioned by the table of fees of the vice admiralty, but there is nothing of the kind in this case alleged or proved. The only question being whether the immemorial usage of receiving fees in the admiralty by the judge,—which has also obtained in the other British colonies where courts of admiralty have been established,—is in force in this country, and thinking as I do, that it is, I concur in the opinion of the court, that the question is one of costs which belongs to the vice admiralty, and that this court has no jurisdiction over it. The action must, therefore, be dismissed.

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SARONY *against* BELL.

20th April.
 1828.

UPON the decease of the late P. A. De Bonne, near Quebec, in the year 1816, he left divers collateral re-

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 inherit the
 personal es-
 tate of a Bri-
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latives, whereof some were natural born subjects of His Majesty, and others aliens resident in the kingdom of France; the latter being in a nearer degree of relationship to the deceased than the former. The Canadian heirs having taken possession as well of the real as of the personal estate of the deceased, this action was brought by the assignee of three out of five of the French relatives,—claiming as heirs of the deceased, a sum of money due to him in his lifetime,—for the purpose of obtaining an adjudication of the court upon the question which had arisen whether the collateral relatives of British birth or those of French birth were entitled to recover this debt, forming part of the personal estate left by the deceased.

To this action the defendant pleaded the general issue, and also a special plea in bar, setting forth “that the assignors of the obligation were not the heirs of the late P. A. De Bonne, deceased, that they were aliens born in foreign parts, out of the allegiance of our Lord the King, and within the allegiance of a foreign state, to wit, of His Majesty the King of France and Navarre, and not subjects of our said Lord the King, by naturalization, denization or otherwise, that they were and still are resident out of the allegiance of our lord the King, and within the allegiance of the said King of France, and that if even they were the nearest relatives of the late P. A. De Bonne, they could not take the goods, monies, &c. in his estate, because he was a subject of our lord the King, and in his allegiance at the time of his decease, and therefore, the sum demanded by the plaintiff could not have been assigned to him, as in the declaration set forth.” Issue having been

joined on these pleadings the parties were heard upon them as upon a demurrer, to the plea of exception.

In support of the plea it was said that this was not a claim founded on the *droit d'aubaine*, which, it was admitted, was an odious law, and such as ought to receive the most strict construction, but simply a question of civil right between two classes of persons, as to the class upon which the law had cast the inheritance of the personal estate of a deceased British subject. That the late P. A. De Bonne having been domiciliated in Lower Canada at the time of his decease, the distribution of the personal estate left by him, must be regulated by the law of this country, unless some treaty, binding upon all the King's subjects, could be shewn whereby the right of inheriting the personal estate of deceased subjects of the kingdom, domiciliated in Canada, had been conferred upon the subjects of the King of France. That the treaties bearing upon the present question, were,

1. The 13th article of the treaty of *Utrecht* (A. D. 1713) the words of which are that " it shall be lawful and free for merchants and others being subjects to the Queen of Great Britain or to the Most Christian King, by will and by any other disposition made either during the time of sickness or at any other time before or at the point of death to devise or give away their merchandize, effects, monies, debts belonging to them and all moveable goods which they leave or ought to have at the time of their death within the dominions and any other places belonging to the Queen of Great Britain and to the Most Christian King. Moreover,

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“ whether they die having made their will, or intestate, their lawful heirs, executors, or administrators residing in either of the kingdoms or coming from any other part, although they be not naturalized, shall freely and quietly receive and take possession of all the said goods and effects whatsoever according to the laws of Great Britain and France respectively ; in such manner, however, that the wills and right of entering upon the inheritance of persons intestate must be proved according to law, as well by the subjects of the Queen of Great Britain as by the subjects of the Most Christian King in those places where each person died, whether that may happen in Great Britain or in France, any law, statute, edict, custom or *droit d'aubaine* whatever to the contrary notwithstanding.”

2. The 3rd article of the treaty of *Aix-la-Chapelle*, the words of which are “ The treaties of Westphalia of 1648, those of Madrid between the Crowns of England and Spain of 1667 and 1670. The treaties of peace of Nimeguen of 1678 and 1679, of Ryswich of 1697, of Utrecht of 1713, of Baden of 1714. The treaty of the triple alliance of the Hague of 1717, that of the quadruple alliance of London of 1718, and the treaty of peace of Vienna of 1738, serve as a basis and foundation to the general peace and to the present treaty ; and for this purpose they are renewed and confirmed in the best form, and as if they were herein inserted, word for word, so that they shall be punctually observed for the future in all their tenor and religiously executed on the one side and the other, such points,

" however, as have been derogated from in the pre-
 " sent treaty excepted." 3. The 2nd article of the
 treaty of *Paris*, (10th February, 1763,) the words of
 which are " The treaties of Westphalia of 1648.
 " Those of Madrid between the Crowns of Great
 " Britain and Spain of 1667 and 1670, the treaties of
 " peace of Nimeguen of 1678 and 1679, of Ryswich
 " of 1697, those of peace and commerce of Utrecht of
 " 1713, that of Baden of 1714, the treaty of triple
 " alliance of Hague of 1717, that of the quadruple
 " alliance of London of 1718, the treaty of peace of
 " Vienna of 1738, the definitive treaty of Aix-la-Cha-
 " pelle of 1748, and of Madrid between the Crowns
 " of Great Britain and Spain of 1750, as well as the
 " treaties between the Crowns of Spain and Portugal
 " of the 13th February, 1668, of the 6th February,
 " 1715, and of the 12th February, 1761, and that of
 " the 11th April, 1713, between France and Portu-
 " gal with the guarantees of Great Britain serve as a
 " basis and a foundation to the peace and to the pre-
 " sent treaty, and for this purpose they are all re-
 " newed and confirmed in the best form, as well as all
 " the treaties in general which subsisted between the
 " high contracting parties before the war, as if they
 " were inserted here, word for word, so that they are
 " to be exactly observed for the future, in their whole
 " tenor and religiously executed on all sides, in all
 " their points, which shall not be derogated from by
 " the present treaty, notwithstanding all that may
 " have been stipulated to the contrary by any of the
 " high contracting parties ; and all the said parties
 " declare that they will not suffer any privilege, fa-

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“ vor or indulgence to subsist contrary to the treaties above confirmed, except which shall have been agreed and stipulated by the present treaty.”

4. The 2nd article of the treaty of *Versailles* (A. D. 1783,) the words of which are “ The treaties of Westphalia of 1648, the treaties of peace of Nimeguen of 1678 and 1679, of Ryswich of 1697, those of peace and commerce of Utrecht of 1713, that of Baden of 1714, that of the triple alliance of the Hague of 1717, that of the quadruple alliance of London of 1718. The treaty of peace of Vienna of 1738, the definitive treaty of Aix-la-Chapelle of 1748, and that of Paris of 1763 serve as a basis and foundation to the present treaty and to the peace ; and to this purpose they are all renewed and confirmed, in the best form, as well as all the treaties in general which subsisted between the high contracting parties before the war, &c.” And lastly, by the treaty of Paris of the 30th May, 1814, article 28, “ the abolition of the *droit d'aubaine* and others of the same nature in the countries which reciprocally stipulated it with France, or which had been antecedently annexed to it is expressly confirmed.” That the general rule of the law of France, similar herein to the law of Rome was, *Peregrinus capere non potest hereditatem* except he were specially qualified to that effect by a treaty between the sovereign states to which the two parties belonged, and the foreigner claiming, as he does, under an exception to the rule was bound to bring himself within the strict letter of the treaty. Now, the treaty of *Utrecht* and the subsequent treaties which are confirmatory of its provi-

sions relate to the successions either testamentary or *ab intestat* of English subjects dying in France, and of French subjects dying in England. The French subjects claiming the personal estate of the late P. A. De Bonne do not then bring themselves within the letter of this clause of the treaty, nor indeed within the spirit of the clause. It relates to the legal right of *aubaine* and cannot reasonably be extended to the case of a private succession of one of the king's subjects dying within his dominions which is a matter of mere municipal regulation. That this question had come before the French courts and the construction given by them to the treaty of *Utrecht* had been as above. (a)

On the part of the plaintiff it was urged, that the subject in controversy was to be regulated by the public law of England touching as it does the rights of aliens in respect of whom the law was and must be uniform throughout the British empire. That an alien has no heritable blood and therefore cannot inherit land; and moveable property he does not inherit, he takes it under the statute of distributions. (b) By the law of England an alien might take out letters of administration, and it was a settled point, that the next of kin referred to in the statute of distributions are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration. That in France the *droit d'aubaine* did not operate against the subjects of the states who did not

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(a) L. C. Den. v. Anglois, 4. 1. Dict. de Dom. Anglois.

(b) Petersdorff's Abr. v. Descent, 38. Administration, 238. Distribution, 446, Str. 1082, 16 Rep. de Jur. 553 v. Succession.

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exercise it with respect to the subjects of the King of France. (a)

It was urged in reply that the matter of succession was, generally speaking, a matter of purely arbitrary municipal regulation owing its existence absolutely to the civil code of each particular country, and could only be considered as appertaining to the domaine of public law when it was made the subject of specific convention in the public acts and treaties of independent states, and so far forth as such conventions extended and no farther. That the rule of the English law, in this particular, was founded upon motives of public policy peculiar to herself and for the encouragement of foreigners coming to trade in Great Britain and in no wise any supposed right in foreign states. (b) That these motives do not extend to the colonies, (c) it not having been the policy of the empire to encourage the establishment of foreign merchants in the colonies, but quite the contrary as will be seen by the navigation act of Charles II. That the subject had been treated as if the succession in question were that of an alien dying in one of the British colonies and having heirs or other personal representatives resident abroad : but that this succession was that of a British subject dying in a British colony and leaving therein heirs also British subjects qualified to take the succession and who are now to be excluded therefrom by foreigners setting forth nearer propinquity of blood. That although the modern French code adopted the principle that the suc-

(a) 2 Pandeotes 135, which refers to an arrêt. 1 Black. Com. 372. L. C. Den. v. Aubaine. (b) Chitty on Prerog. 228. Bac. Abr. Aliens, C. (c) 4 L. C. Den. v. Colonies Franc. § 2, No. 8.

cessions of foreigners and the claims of foreigners to a share in the successions of French subjects should be regulated upon the principle of reciprocity this was an arbitrary rule of that code (a) and was not to be found either in the law of England or of France, transferred to and subsisting in this country.

By the judgment of the court the plea of alienage was overruled,* and proof ordered upon the issues of fact.

(a) Toullier liv. III. tit. 1.ch. 2. § 102.

* This action was dismissed on the 20th April 1830, upon the defendant's motion, for want of proceedings during one whole term, but as he had omitted to move during several terms it was dismissed without costs.

Vide the case of the *Viscomte DELERY* against *DELERY*, decided in B. R. Q. on the 11th day of April 1834. This action was brought by the plaintiff as the only son and sole heir at law of the late *Viscomte DELERY*, who died in France, to recover the balance of the price stipulated in a deed of sale from the latter to his brother, the defendant, of one half of certain estates and seigniories which they inherited in common from their father the late *Joseph Gaspard Chaussegros Deléry*, in his lifetime one of the members of the legislative council of this province. The defendant, with other grounds of defence, pleaded that the plaintiff was an alien and could not take by inheritance any immoveable property or *droit immobilier*, alleging that the object of the plaintiff's demand was in its nature immoveable property. The court overruled this plea, stating it entertained no doubt of the right of the plaintiff to inherit personal property, and that the sum demanded being such, judgment must be for the plaintiff. This judgment was affirmed in the court of appeals on the 15th day of November 1834.

For exceptions to the law of alienage by treaties as recognized in France, vide *Pothier, Tr. des Successions*, c. 1, art. 2, § 1, p. 10. *Rep. de Jur. v. Succession* p. 551. 2. L. C. Den. 580. v. *Aubaine*, 1 *Rep. de Jur. v. Anglois*, 439. *Ib. v. Aubaine*, 722. *Ib. v. Succession*, 551, et seq.

Le droit d'aubaine est aboli entre la France et la Grande Bretagne, pour les biens meubles seulement. Les sujets de l'un des deux royaumes, peuvent réciproquement dans l'autre royaume, disposer comme bon leur semble de ces biens, ou les transmettre *intestat*; ils sont habiles aussi, en justifiant de la qualité d'héritier, à recueillir les successions mobilières de leurs compatriotes, mais ils n'ont aucun droit sur celles des nationaux. Ces principes résultent de plusieurs conventions.—*Gaschon, Code Diplomatique des Aubains*, p. 1. Je comprend sous la dénomination de la Grande Bretagne, l'Angleterre, l'Ecosse, l'Irlande et plusieurs autres îles. Les colonies soumises constamment aux lois générales de leur métropole, ne se ressentent pas du droit d'exception. 1b.

As to English law upon the subject of alienage as between France and England, and acted upon in France, vide the opinions of *De Grey*, Attorney General, and *Dunning*, Solicitor General, cited in a case of *Cassation* before the Council in France. 16 *Rep. de Jur. v. Succession* p. 553. For an opinion of Sir *James Mansfield*, Solicitor General, as to the rule of the

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English law, not being affected by hostilities between the two countries.
1 L. C. *Denizart*, v. Aubaine, p. 610.

As respects the right of foreigners to inherit personal property in England, vide the case of Sir *Upwell Caroon*, Crokes' Car. p. 8. 1 Com. Dig. 361. v. Administration. Ib. 347-8 as to right of administration in next of kin. For modern cases vide the case of *Cambiaso v. Negrotto*, 2 Ad-dams' Ecclesiastical Rep. 439. 1 Haggard's Ecclesiastical, Rep. 93. In the goods of the Elector of Hesse.

JOHN SCOTT AND ANOTHER.....*Appellants.*

and

THE PHŒNIX ASSURANCE COMPANY,...*Respondents.*

13th May,
1829.

The court of appeals may hear an objection not argued in the court of original jurisdiction.

If a condition, referred to in a policy of insurance against fire, requires in the event of loss, and before payment thereof, a certificate to be procured under the hand

of a magistrate or sworn notary of the city or district, importing that they are acquainted with the character and circumstances of the persons insured, and do know or verily believe that they have really and by misfortune without fraud, sustained by fire loss and damage to the amount therein mentioned, such certificate is a condition precedent to a recovery of any loss, against the insurers, on the policy. And if a certificate be procured, in which a knowledge and belief as to the amount of loss is omitted, it will be insufficient.

THIS was a case of appeal from the judgment of the court of appeals of Lower Canada by which a judgment rendered in the court of King's Bench at Montreal, in favor of the appellants, had been reversed and their action dismissed with costs.

THE VICE CHANCELLOR. Their lordships will not trouble the counsel for the respondents in this cause. There appears only to be, in fact, two questions; and the first question that has been made is, whether it was competent to the court of appeals of Lower Canada to hear an objection which was not argued in

the court of original jurisdiction. Now, taking it for granted, the objection was not argued in the court below, there is no rule of law which prevents a person appealing from arguing a question which was never argued in the court below. It is the constant practice of the court above, though they often do refuse to hear arguments that were not argued in the court below ; and it is observable that the very case which has been brought into discussion, furnishes an instance of the right of the parties to use before the court of appeals arguments which were not used in the court below ; for in the case of *Wood v. Worsley*, (a) Lord *Kenyon* commences his judgment, having referred to the point of a *venire de novo* in these words :—" The second point respecting the *venire de novo* is now for the first time started, no notice having been taken of it on the first argument here, or on the motion to arrest the judgment in the Court of Common Pleas ; if there appeared to be any ground for it, we would desire to have the case further investigated," and so on.

Then with respect to the principal question, it appears to their Lordships, this case is governed by the case of *Oldham v. Bewicke*, and *Wood v. Worsley*. (a) The only difference between the two cases is this, that by the certificate in the present case, the parties certifying were to certify to their knowledge or belief, that a loss had been sustained to the amount therein mentioned, manifestly implying that their certificate itself was a certificate of the amount of the loss according to the knowledge and belief of the certifier. Now here no amount whatever is stated, and it is of as much im-

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(a) 2 H. Black. R. 574 and 577, in note.

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portance to the company to have the knowledge and belief, and getting persons pledged to the amount of the loss, as it is of importance to them to have persons giving that pledge as to the character of the parties; and the principle, therefore, of these two cases, appears to their Lordships so completely to govern the present case, that they think the judgment below must be affirmed. It is observable, from the judgment, in *Oldham v. Bewicke*, that it was a case where the objection to the certificate appeared upon the face of the declaration, and the defendants below not having taken advantage of the condition precedent, the plaintiff had recovered a verdict, an application was made to the court to set aside the verdict; and Lord *Loughborough* said: "Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the bankrupt had not sustained all the loss he claimed; yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case." In this case their Lordships think there was an absolute defect of title, of which advantage may be taken in the way it has been, by arguing the objection in the provincial court of appeals for the first time, and therefore the judgment of the court below must be affirmed.

Mr. *Brougham*—your Lordships affirm the judgment with costs?

The *Vice Chancellor*—yes; I intend to give costs.

ON APPEAL FROM QUEBEC.

VAN KOUGHNET.....*Appellant.*
 and
 MAITLAND AND OTHERS.....*Respondents.*

24th July,
 1829.

ON the twenty-ninth day of May 1827, one Alexander McDonald being indebted to the respondents, they obtained an attachment against his moveable effects and estate personal. Under this process a raft of oak and pine timber then lying at Cape Rouge, was attached by the sheriff as belonging to the defendant, McDonald. In the progress of the respondent's suit to recover their debt, the appellant intervened and claimed the timber as his property, the same having been in his possession, until the seizure of it by the respondent, in virtue of a delivery thereof on the 1st day of May 1827, and of another delivery on the 20th day of the same month, in pursuance of a contract made at Cornwall in Upper Canada, on the 6th day of January 1827, between the appellant and the defendant, in the following terms: "The said Philip Van Koughnet doth hereby agree to furnish the said Alexander McDonald with such articles of merchandise, provisions, grain, forage and other necessa-

Advances in goods, under a written agreement, are made by A, a merchant in Upper Canada, to enable B, a contractor for lumber, to cut, and convey to the Quebec market, a quantity of timber upon the conditions, that as soon as dressed it should be considered as belonging and delivered to A, but conveyed to market at the risk and expense of B. That A. should have the sale of the timber, and account to B. for any balance remain-

ing, after a deduction of his disbursements and advances, including 10 per cent upon the latter, with a commission of 2½ per cent upon the sale: Held, that after a delivery to A, before it reaches the market, without fraud or collusion with B. the timber could not be attached at the suit of B's creditors in payment of his debts, but the balance if any, after a sale by A. can alone be arrested in his hands, under the process of the court.

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“ries as he the said Philip Van Koughnet shall deem
“advisable and expedient,—and for such term of time
“as he the said Philip Van Koughnet shall think pro-
“per, in order to enable the said Alexander McDonald
“to get out lumber, and to carry the same to market.
“And the said Alexander McDonald on his part, doth
“hereby agree to deliver over every stick of lumber
“or timber, that he shall prepare or cause to be pre-
“pared for market, so soon as the same shall be dressed
“for that purpose, as well as all that has already been
“made or caused to have been made by him the said
“Alexander McDonald, or has been or shall be pur-
“chased by him, to the said Philip Van Koughnet as
“agent, who shall have full power and authority to
“mark the same in his the said Philip Van Koughnet’s
“name, or cause the same to be so marked, which
“lumber or timber shall be considered, *bonā fide*, the
“property of the said Philip Van Koughnet, and the
“said Alexander McDonald shall not have any power
“or authority to dispose of the said lumber so got out
“or purchased by him the said Alexander McDonald,
“or any part thereof, without the consent or permission
“of the said Philip Van Koughnet, or his agent; and
“the lumber so got out or purchased by the said
“Alexander McDonald, is to be taken to market by
“him the said Alexander McDonald at his own risk
“and expense, and to be disposed of by the said Phi-
“lip Van Koughnet, or his agent, at the sole risk of
“the said Alexander McDonald; and after such dis-
“posal the said Philip Van Koughnet shall retain to
“himself a sufficient sum to cover all the advances
“made by him the said Philip Van Koughnet to the
“said Alexander McDonald, together with all neces-

“ sary expenses that the said Philip Van Koughnet, or
“ his agent, shall be at in getting the said lumber to
“ market, and paying off and discharging all such
“ hands as shall have any just claims or charges against
“ the said Alexander McDonald for getting out and
“ taking the said lumber to market; including ten
“ pounds upon every hundred pounds that shall be ad-
“ vanced by the said Philip Van Koughnet, in cash,
“ provisions, grain, and forage, with a commission of
“ $2\frac{1}{2}$ per cent upon the sale of the whole of the lum-
“ ber; but should it be necessary for the said Philip
“ Van Koughnet to give over the said lumber to any
“ other person to dispose of, then in that case the usual
“ commission shall be allowed such person for dispo-
“ sing of the timber, the surplus, if any, to be paid
“ over to the said Alexander McDonald, to and for his
“ own use and benefit.” The demand in intervention
further stated, that in furtherance of the above con-
tract the appellant advanced the sum of £257. 11s. 4½d.
by means of which alone, McDonald was enabled to
get out the timber in question. It also contained four
other counts, alleging, 1. A delivery in trust upon the
advances, &c.; 2. an account stated, and a delivery
of the timber in payment; 3. a right to obtain the
timber *en revendication*, and 4. a *lien* for the balance
due upon the advances. The respondent pleaded the
general issue only, and by the evidence it appeared
that the timber was cut, and the appellant's mark put
upon it at Jessop's falls on the Ottawa. The raft was
given in charge by the defendant, to one John Mc-
Donald as his foreman and agent, and in the river be-
hind the Island of Montreal, the raft having been di-

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vided into two for facility in descending the rapids, the appellant went upon it and the foreman delivered the timber to him, at which time some of the pieces were marked with the appellant's name. The appellant then left the raft which arrived safe at Quebec, where he again went upon it, paid the foreman his wages and some of the other hands. By the judgment of the Court of King's Bench the demand in intervention was dismissed.

For the appellant, it was contended that there was no ground for the imputation of fraud, and it could not be supposed to exist in relation to the contract. That the possession of moveables was *prima facie* evidence of property, and it is not necessary to prove an absolute right of property, but a special or qualified right would be sufficient. That the appellant was a qualified owner, having provided the funds which created the property, and could not be divested of it until his debt was satisfied. Whatever balance remained after the sale, the respondents were entitled to, and that was all the appellant could be made answerable for. He was also a pawnee, and although the principle must be admitted that the right of the pawnee existed only during possession, and was lost with the possession, the appellant had a continued possession through John McDonald and the men of the raft, who had become his servants. The delivery was an actual delivery, though from the nature of the case, only a constructive one; it was a *fictio longæ manûs*, or a delivery by pointing out. There was no other remedy than an intervention, as an action against the sheriff would not lie.

On behalf of the respondents it was contended, 1.

That there should have been a contract between the parties of a nature to create the right in question. 2. That this contract should have been executed by an actual delivery of the subject matter of the lien in pursuance of the contract, and 3. That the goods should have continued in the actual possession of the party claiming the right of lien. That all these requisites were wanting and no right of lien therefore existed. By the terms of the agreement the timber in question was to remain in possession of the defendant until its arrival at the Quebec market and then be delivered to the appellant, and it was not pretended that any delivery had been then made in pursuance of it. The agreement being in writing could not be modified or altered by any mere parol agreement between the parties. (a) That this agreement had not in law vested any right of lien in the goods in question in favor of the appellant, because it was unaccompanied by an actual delivery, and it was in its very terms executory,—the timber remaining in the intermediate time in the possession and under the control of the debtor. (b) That the pretended delivery of the timber behind Montreal, if made at all, was illegal and invalid (c) the same having been made to defraud the creditors of the defendant in a clandestine manner whilst the defendant was an absconding debtor, and this to the knowledge of the appellant, a fact established by almost all the witnesses examined. The defendant could not come within the

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(a) Phillips on Ev. 530, ch. 10. § 2, 6th ed. (b) Poth. Contrat de Nantissement, Nos. 8. 13. Ferr. Gr. Cout. art. 181, § 2. Poth. Tr. du Droit de Prop. No. 245-7. (c) 2 Phillips on Ev. p. 92. and the case of Astey v. Emery, there cited.

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limits of Lower Canada, it was, therefore, necessary that the timber should be sent there in the name of a third person. Besides, the delivery, at the most, was only of certain sticks or pieces of timber whereupon the foreman put certain marks or signs, and could only have effect as respected them, (a) and these too remained in the possession of the defendant through his servants and workmen, and no right of lien could have accrued even as respected them. As respects the possession it could amount to no more than a constructive possession, and the appellant as pledgee could derive no right from it, a real and actual possession being by law required to maintain a right of lien similar to that set up by the appellant. (b) If one half of the raft had been delivered to the appellant in person he lost his possession, such as it was, when he left it and thereupon it remained in the possession of John McDonald who was the servant and agent of the defendant whosoever servant he chose to consider himself.

REID, CH. J. The contract between the appellant and the defendant having been proved, as also that it was by means of the advances made by the appellant that the timber was procured, the whole merits of the case rest on the facts of delivery and possession. If the delivery was a sufficient delivery the appellant has clearly established his right, if not the respondents were entitled to possession of the raft. Contracts of this nature ought to be favorably considered as being the means of facilitating trade and bringing a staple

(a) 2 Denizart 300 v. Facteur. (b) Arrêt of 20th June, 1770, in 2 Denizart 300 v. Facteur. Paley P. and A. 117. Kinlock v. Craig, 3 T. R. 119 and 783. Bell's Comm. 476.

article to market. The advances made by the appellant gave him an equitable claim though not a perfect lien, and to constitute a lien an actual, and not a constructive possession, was requisite, although a constructive possession was sufficient in cases of sale. The first delivery in Upper Canada it seems had been abandoned, and rightly, for it was not an actual one : the other, at the back of the island of Montreal was better established, and in the judgment of the court sufficiently proved by the foreman. The appellant was personally present, and by putting his foot on the raft took actual possession. From that time forward the foreman not only considered himself in the employment of Van Koughnet but actually received his wages from him at Quebec, as did some of the other hands. It has been objected that the raft was only to be delivered at Quebec and that the foreman had no right to alter the agreement in that respect ; but the contract cannot be so construed, for it is even expressly said the timber was to be delivered as soon as cut and dressed ; this plainly shews that an anterior delivery was provided for in the contract, and the delivery proved was, therefore, consistent with the terms of the contract and the intention of the parties. As to only a few pieces of timber being marked that was no valid objection, the raft itself was marked with the appellant's name, (a) and it might as well be contended that every piece contained in a bale of dry goods should be separately marked, as that every stick of timber in a raft required it. It has also been objected that possession had been

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(a) Ellis v. Hunt, 3 T. R. 468.

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abandoned, but when the delivery was effected the raft came under a fresh control; and this we were not left to presume but had the direct testimony of the foreman that it was so. The appellant acted as owner,—the foreman as his agent,—the men became his servants, and he it was who paid them their wages. Again, it has been said the raft was separated, and only part delivered, but this separation was merely for temporary purposes, it was reunited and came whole to Quebec, with the appellant's mark upon it. The intention of the parties must be looked to, they were fulfilled by the whole raft coming under the appellant's orders, as the delivery of a part of a ship's cargo, when a bargain has been made for the whole, is, in law, a delivery of the whole. (a) The court views all these objections as unfounded. The appellant appears to have acted throughout, with good faith; he was doing no injury to the other creditors of the defendant, but was rather promoting their interest by assisting him, and they ought not to injure him by depriving him of his *lien*. (b) They possess all the advantage they are entitled to in virtue of the attachment or *saisie arrêt* under which the balance of the proceeds of the raft will come into their hands. Contracts of this kind might indeed be invalidated, if made for the purposes of fraud and collusion, but there was none such apparent in this case. The judgment of the court is, that the raft be delivered to the appellant, with a reservation, to the respondents, of such rights as they may possess in virtue of the *saisie arrêt*.
Gugy for the appellant.—*A. Stuart and Black* for the respondents.

Judgment reversed.

(a) 2 H. Black. R. 504. (b) *Hussey v. Christie*, 9. East, 426. *McCombie v. Davies*, 7 East, 8.

GILLESPIE AND OTHERS *against* PERCEVAL.

DUTIES imposed by the British statute of the 14th Geo. III. cap. 88, being due by the plaintiffs, they tendered to the defendant, the collector of the customs at the port of Quebec, as many Spanish dollars as at the rate of 4s. 6d. sterling each, were equal to the amount of such duties. This tender was refused upon the ground that the defendant was not by law authorized to receive Spanish dollars in payment of duties imposed by the above statute, at any rate exceeding 4s. 4d. sterling per dollar. The duties were subsequently paid by the plaintiffs in the same coin at the rate of 4s. 4d. and this was an action for money had and received, being the difference between the two valuations of the dollar above stated, viz, two pence on each dollar. The detention of the sum demanded by the plaintiffs, which, it was alleged by the defendant, had been exacted under a late order of the Lords of the Treasury, was justified under the provisions of the statute 14th Geo. III. cap. 88, passed in 1774, intituled, "An act to establish a fund towards further defraying the charges of the administration of justice and the support of the civil government within the province of Quebec in America." After imposing certain duties, it proceeds to enact that these duties "shall be deemed and are declared to be sterling money of Great Britain, and shall be collected, recovered and paid to the amount of the value which such nominal sums have in Great Britain, and that such

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By the statute 14th Geo. III. c. 88, duties, upon the importation of goods into Lower Canada, are sterling money of Great Britain, and the uniform standard of value at which foreign coins are to be received in payment, is their contents in pure silver at 5s. 6d. sterling per ounce.

A tender of the Spanish dollar at 4s. 6d. sterling, the value fixed by the provincial statute 48, Geo. III. c. 8, for the payment of all debts and demands, is not a legal tender in payment of duties.

The value of the Spanish dollar in sterling money is 4s. 4d.

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" monies may be received and taken, according to the proportion and value of five shillings and six pence the ounce in silver."

For the plaintiff it was contended, that the practice which has obtained since the passing of the act of the 14th Geo. III. of paying dollars in satisfaction of the duties imposed by that act, down to the late order of the Treasury, at the rate of 5s. 6d. the ounce, is correct, this rate having been legally established by the provincial statute 48th Geo. III. cap. 8. The statute of 6 Anne, cap. 60, gives the colonial legislatures the power of regulating the coin within the colonies. Such power legally exercised, is final and conclusive as to the subject of it, until restrained or modified by the paramount authority of the imperial legislature. The enactments of the provincial legislatures are conclusive under that statute, as to the standard of the metals to be received within the colonies respectively, as coin, for this is necessarily involved in the power of giving these coins currency. The only test of the fineness of the metals when used as money, is the sanction given by the law to the external marks impressed upon them, whereby their internal merit and sufficiency can only be measured by the people. The local legislature of Lower Canada then having given currency, and rendered a legal tender the Spanish dollar, has thereby rendered it standard silver for all colonial purposes. If there were an assay in Lower Canada, which there is not, the superior authority of the legislature would have precluded all interposition of the authority of the assay master. The law creates a presumption *juris et de jure* as to the fineness of the metal. But if it were admitted for argument sake that the provincial statute

was not conclusive upon this head, still the order of the Treasury could not be supported. The first part of the second section of the 14th Geo. III. upon which this question turns, cannot be read through upon the construction given to it by the Lords of the Treasury. 1st. The sterling money mentioned in the first of the three branches of this section manifestly means sterling money of account, for the term nominal sums met with in the second branch of this section is utterly inapplicable to real monies. 2. The sterling money here referred to is the sterling money of *the rates and duties charged by this act*. Now, although in common parlance, the monies paid for duties are often eliptically called duties, yet in truth and strictness it is to be observed that *rates and duties* are things altogether different from the monies wherewith the individuals satisfy them; and accordingly it is by the second branch of this section directed that these *rates and duties* "shall be collected, recovered and paid to the amount of the value of which such nominal sums bear in Great Britain." Having thus ascertained what the money in account is, wherein the duties are to be paid, the statute next proceeds in its third branch to ascertain the rate at which the *real* money shall be paid and received. At this time silver, not gold, was the standard of the money of England, and the value of the English monetary unit of one ounce of Standard silver was 5s. 2d. sterling. This statute does not adopt the monetary unit of England of that day, to wit, of 5s. 2d. the standard ounce of silver; it establishes another monetary unit peculiar to the colonies, the monetary unit of 5s. 6d. the standard ounce.— Upon this second hypothesis the rule by which Spa-

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nish dollars would be to be received, may be thus arithmetically stated :

Monetary Unit of silver in Great Britain.		Value of Spanish dollar according to this unit.		Colonial monetary unit under the 14th Geo. III.
As 5s. 2d.	is to	4s. 4d.	so is	5s. 6d. to 4s. 7½d.

And this last sum would give the true value of the Spanish dollar in the colonies under the British statutes. But it has been shewn under the first head of argument that a value belongs to it, that is, the value of standard silver having been rendered such by acts of the colonial legislature under the authority of an act of the imperial parliament, to wit, the act of Anne, already adverted to. Nor ought the order of the Treasury in question to be considered as forming any very strong presumption in favor of the construction upon which it proceeds. That order (it may be said with all humility,) does not exhibit any very intimate knowledge of the subject under consideration, and of this we have in Canada a practical proof. Made with a view of rendering current, in the British colonies, the British coin, it is so imperfectly framed that British silver is never seen in circulation in the colonies. It can only be found in the chests of the commissariat and of private bankers.

The argument for the defendant will be found incorporated in the opinion of the court.

SEWELL, CH. J. The decision of the question submitted to us depends upon the legal construction of the clause in the 14th, Geo. III. c. 88. It has been contended by the plaintiffs that the statute 6th, Anne, c. 60, empowered the several colonial legislatures, with the assent of the crown, to settle and ascertain the current rates of coins within the colonies, and

that the provincial statute of Lower Canada of the 48th, Geo. III. c. 8, has enacted, " That the Spanish " milled dollar shall pass current, and be deemed a " legal tender in payment of *all* debts and demands " whatsoever in this province, at the rate of 4s. 6d. " sterling per dollar." But neither of these statutes can affect the enactment contained in the 14th, Geo. III., certainly not the statute of Anne, because being a British statute it cannot affect the provisions of a British statute passed subsequently to it if they militate against it, and certainly not the provincial statute 48th, Geo. III. because the British statute 31st, Geo. III. c. 31,—the authority upon which this provincial statute is founded,—has enacted, " That " nothing in that act contained shall extend or be " construed to extend to prevent or affect the execution of any law which hath been or shall be at *any* " time made by His Majesty and the parliament of " Great Britain for imposing, levying, or collecting " duties, or to give to His Majesty any power or " authority by and with the advice and consent of " the Legislative Council and Assembly of the province, to vary or repeal any such law, or any part " thereof, or in any manner to prevent or obstruct " the execution thereof." On the other hand, it has been said by the defendant that he had acted according to the construction put upon the 14th, Geo. III. by the Lords of His Majesty's Treasury and in obedience to orders received from his immediate superiors the commissioners of the customs. But it matters not what construction may have been put upon this act by the Lords of the Treasury, and what the orders of the commissioners of the customs may be is

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equally immaterial. The construction of acts of parliament is the peculiar duty of His Majesty's judicial officers and they exercise it to the exclusion of all his officers whose duties are purely ministerial. We return to the consideration of the statute 14th, Geo. III. and more particularly to the clause above cited. It should be here remarked that at the time and when this statute was passed (1774) there existed in Great Britain a nominal money of account under the denomination of sterling which still exists. There existed also a metallic currency the standard of which was then established *in silver*. That in the then newly created province of Quebec there was no paper currency of any description, or any circulating medium except metallic monies, of which the coins of Great Britain were a small portion, and the residue a variety of gold and silver coins of other governments, all differing the one from the other in the quantity of alloy which they contained. That the "Halifax currency" by which the Spanish dollar is valued at 4s. 6d. sterling had been introduced into the province by an ordinance of General Murray, but that all his ordinances had been abolished by a British statute of the same session, the 14th, Geo. III. c. 83, and lastly, that the currency of France, as a money of account, was still in use among the said subjects. With all these facts in view the Imperial Legislature by the first clause of the statute in question imposed a duty of 3d. on each gallon of brandy of the manufacture of Great Britain imported into the province; 6d. on rum, if imported from any of the West India colonies; 9d. if imported from any of the king's colonies in America, and 1s. on foreign brandy. Upon mo-

lasses imported in ships belonging to His Majesty's subjects in Great Britain, Ireland, or the province of Quebec, 8d. ; and upon molasses imported in any other ships, 6d. Having imposed these duties the statute, to obviate the difficulties which might arise from the different currencies which had been in use, or might thereafter be in use in the province, declares that the nominal money of account called sterling money of Great Britain shall be the standard of amount by which the *quantum* of duties to be collected, paid, or received in every case shall be estimated, and for this purpose enacts, " That the said rates and duties charged by this act shall be deemed and are hereby declared to be sterling money of Great Britain, and shall be collected, recovered and paid to the amount which such nominal sums bear in Great Britain." But this is not all for which it was necessary to provide ; the value of the several coins which composed the metallic currency of Great Britain had indeed been long established by law, and at that value respectively they were already a lawful tender in all payments throughout the king's dominions, but in consequence of the abolition of General Murray's ordinance respecting the " Halifax currency" there was no longer any fixed standard of value at which the foreign monies which were then, or might thereafter be in circulation in the province, could be paid or received. In order, therefore, to accommodate the tax to the actual state and condition of the province, to secure (at all events) the full payment of the new duties, in the metallic monies of any foreign government which might be in circulation in the province, and to avoid the difficulties

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which might arise from the difference of alloy in foreign coins, and from the ordinary fluctuations in the price of silver. The statute having established the standard of amount, proceeds to establish a fixed and uniform *standard of value* at which the monies of other governments might be received in payment of the duties which it imposed, which standard it declares to be the contents of such monies respectively in silver at the rate of 5s. 6d. sterling per ounce, assuming the sum of 5s. 6d. sterling as an average value of silver per ounce, and for this purpose it enacts, "*that such*" monies may be received and taken according to "the proportion and value of 5s. 6d. the ounce in silver," as was before noticed, being then the standard of the British coinage. I have only to add, that the value of a Spanish milled dollar, with relation to its actual contents in pure silver, as issued from His Majesty's mint is 4s. 4d. sterling, and as the dollars paid to the collector have been received by him at that value, it follows that no more has been paid or received than the exact amount of the duties which were to be collected under the authority and according to the provisions of the statute 14th, Geo. III. c. 88. The collector, therefore, cannot be compelled to refund and the action must be dismissed.

KERR, *Justice*. The simple question submitted to the court, is whether in payment of all duties imposed within this province, the Spanish dollar is to be received for 4s. 4d. or at the rate of 4s. 6d. of the nominal money of Great Britain. One would have conceived that the words, as well of the 14th of his late Majesty, c. 88, as of the 6th of the present King, could leave no doubt as to the means of determining the exact

proportion and measure of value which should subsist between foreign coin and pure silver estimated in value at 5s. 6d. sterling per ounce. The legislature well knew that there was a wide difference in the purity of foreign coins, and it could not be its intention that all *foreign monies* should be received indiscriminately in weight at the standard of 5s. 6d. per ounce, but that such monies when assayed should bear in value the exact measure and proportion as their weight to pure silver, at the rate of 5s. 6d. of the nominal money of Great Britain. The Spanish dollar having been assayed both in London and Paris, as is stated in the evidence of commissary general Routh, and found to contain intrinsically pure silver to the value of less than 4s. 4d. taking its price at the standard of silver affixed by the British statutes, can we upon any principle of law or justice, oblige the defendant to receive the Spanish dollar at a higher value? But it has been urged that the British statute 14th Geo. III. was, in so far as relates to this matter, repealed by a provincial ordinance of the 17th Geo. III. by which the value of the Spanish dollar is said to be ascertained and is declared to pass current for 5s. currency, which is the equivalent of 4s. 6d. nominal money of Great Britain. It may be justly questioned how far the provincial legislature intended more than that it should pass at this value when received in tale and private transactions: and even admitting that it extended to Spanish dollars taken and received generally both in bulk and in tale, yet I cannot admit the principle that a provincial act can repeal a British statute, and set at nought an imperial act, for such would be the establishment of both these propositions. It is admitted that the prac-

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tice for the defendant and his predecessors in office to receive the Spanish dollar in payment of duties at the value of 4s. 6d. British money, prevailed from the year 1774, till within these last two years, and it has been contended for the plaintiffs that this usage and custom has become a rule of law of which the plaintiff is entitled to the benefit. But to establish such a rule the custom must be both immemorial and reasonable, it certainly is not immemorial, and it may be asked whether it would be just or reasonable to oblige an individual to accept a less sum than that actually due to him. It is an established principle "that a man cannot regularly prescribe or allege a custom against a statute, because that is matter of record, and is the highest proof, and matter of record in law, *Coke's Inst.* If the Lords of the Treasury had, in point of fact, given orders to the defendant not to receive the Spanish dollar but at a lower rate than the intrinsic value of the silver contained in it, they would have attempted to exercise a *non obstante* power, such as I believe, has not been exercised by the Crown in any of His Majesty's dominions since the revolution, and the collector would have been more justified in the "breach than in the observance" of such orders. Their Lordships have conformed strictly to the words and spirit of the acts, and judgment must be for the defendant.

TASCHEREAU, *Justice*. The act 14th Geo. III. cap. 88, § 2, in enacting that the duties charged by that act shall be sterling money of Great Britain, thereby declares, 1. that sterling money shall be the standard by which the *quantum* of those duties shall be estimated. 2. It provides, that those duties should be paid and received in a true equivalent, that is, in money or

coins corresponding to the value which such money or coins respectively have in relation to sterling money. 3. It establishes the standard of the value at which these monies shall be received, that is, their contents in pure silver at the rate of 5s. 6d. sterling the ounce. The act permitting the payment to be made in any silver, provided that the pure silver, which it contains, is taken at the rate of 5s. 6d. the ounce, the only question then is to ascertain how much the Spanish dollar (supposing that it is to be taken in payment,) contains of pure silver. Now it is established in evidence that of 416 grains weight it contains only 370 grains 9 dwts. of pure silver, which gives 4s. 3d. decimal 79; and that in the public offices it is taken to avoid the fraction at 4s. 4d. sterling. Such then is the value at which,—by the act of 1774,—the Spanish dollar may be received in payment of duties imposed by that statute. This act has not been repealed by the imperial parliament, or by the provincial parliament, under its authority. The provincial parliament,—if it had the right under the statute of Anne, to regulate the currency,—has not by any means altered the *quantum* of the duties imposed by the act of 1774, it has only made of that coin a legal tender, and could not have in its contemplation any reduction of the duties imposed by the act of 1774, an effect which must have been produced, if the Spanish dollar were taken at a higher rate than 4s. 4d. sterling. Nor indeed could the provincial legislature in virtue of the act of 1791, diminish those duties, or in any way alter the provisions of the statute imposing them.

Judgment for the defendants.

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ON APPEAL FROM MONTREAL.

THE HON. JOHN RICHARDSON.....*Appellant.*

and

JOHN MOLSON AND OTHERS.....*Respondents.*20th Nov.
1829.

A writ of attachment under the ordinance of 1787 may be set aside, 1. If it be not, in the language of that law, against the estate, debts and effects of the defendant to be attached in the hands of some person in particular, and does not contain a summons to him as well as to the defendant to appear. 2. If it be accompanied by an injunction from the judge to the sheriff to retain the effects seized to abide the judgment of the court. 3. If it appears in the declaration that the debt sworn to has been cancelled.

It is essential to the validity of a *scellé*, under the French law, that it be executed by a judge in person and not a ministerial officer of the court, and that the property and papers which are the object of the *scellé* remain under the seal of the court with a guardian to protect them.

AN application was made by motion on behalf of the appellant to the court of King's Bench at Montreal to set aside a writ and process of *saisie arrêt* and attachment, which having been rejected by that court the present appeal was instituted from its decision. The writ in question was founded upon an affidavit in which it was stated, "that Simon McGillivray, of Montreal, merchant, then absent from the province, in his own name as well as in his capacity of executor and residuary legatee of the late William McGillivray, deceased, and Thomas Thain then also absent from the province, the said Simon and William McGillivray and Thomas Thain having theretofore traded at Montreal as co-partners under the firm of McGillivray, Thain & Co. were personally, and jointly and severally, indebted to the deponent and his late co-partners in the sum of £4,000. the amount of a promissory note bearing date at Montreal the 10th

day of January, 1825, that the said firm had since become insolvent and was indebted in more than the sum of £200,000, the above sum included. That the said Simon McGillivray and Thomas Thain do secrete their estate debts and effects, and the estate debts and effects of the said firm with an intent to defraud their creditors, and more particularly the deponent and his late co-partners. That there are in a certain three story stone house and premises situate and being in the city of Montreal forming the corner of St. Gabriel and St. Therese streets, bounded &c. heretofore and still occupied as a counting room for the business of the said firm, *divers books of account, writings, vouchers, documents, securities for money, and correspondence* of the said firm and of the said Simon McGillivray and Thomas Thain containing evidence of debts, assets, sums of money, property and effects in value above £150,000. belonging to the said firm and to the said Simon McGillivray and Thomas Thain, and that there are also in the hands and possession of the Hon. John Richardson of Montreal, Esquire, as well in his own name and behalf as in his capacity of curator to the said Thomas Thain, an absentee, Samuel Gerrard, George Gregory, and Peter McGill in his capacity of curator to Simon McGillivray also an absentee, as the deponent is informed, and verily believes, *divers other books of account, writings, vouchers, documents, securities for money and correspondence* of the said firm and of the said Simon McGillivray and Thomas Thain comprising evidence of debts, &c. by the exhibition of which the deponent and his said co-partners might be enabled to secure payment of their debt. That divers of the said books of ac-

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count, &c. since the declared insolvency of the said firm continue to be changed, altered, and cancelled with the privity and connivance of the said Simon McGillivray and Thomas Thain with a view to disguise the posture of the affairs of the said firm to the prejudice of its creditors. Whereby and *without the benefit of process of attachment for seizing and attaching all and every the books of account, writings, vouchers, documents, securities for money and correspondence* of the said firm and of the said McGillivray and Thomas Thain, *as well those in the three story stone house and premises* hereinbefore described *and elsewhere*, as those in the hands of the said John Richardson, &c. to await the order and judgment of the court touching the same, which the deponent prayed might forthwith issue, he the deponent and his co-partners might lose his debt and sustain damage." In accordance with the prayer contained in this affidavit an order was given by one of the judges of the court of King's Bench at Montreal, for the issuing of the process of attachment as prayed, containing an injunction to the sheriff to take into his custody *the books of account, vouchers, writings, documents, securities for money and correspondence* in question, and to detain and hold the same in his hands and custody to abide the judgment of the court. Process of attachment was consequently issued, as prayed, and the sheriff returned that he had executed it and taken into his own charge and custody the books of account, &c. To the writ was annexed a declaration setting forth the plaintiff's cause of action.

For the appellant it was contended, 1. That by the law of this province no writ of attachment simi-

ar to the present could issue under any circumstances. 2. That sufficient grounds did not exist for issuing a writ under the legal forms. There are but two kinds of attachment which could have been issued in this case prior to judgment, the first is the writ of *arrêt simple* for the seizure of personal goods, (meubles,) susceptible of being sold under an execution, in the hands of the debtors, to prevent their being disposed of, and to secure them for their creditors. The second is the writ of *saisie arrêt* by which such things as are not liable to be sold, termed in the English law, *choses in action*, might be attached in the hands of third persons. These two kinds of process were essentially different and distinct. In the writ before the court both were combined, and it specified nothing but things unsuceptible of attachment they not being corporeal goods. By the provincial ordinance of 1787, (a) the only attachment that can be had against a debtor before trial and judgment must be against the estate, debts, and effects. No other description of things can be specified in the writ; it being matter of legal construction to determine what things are or are not comprehended in these words. The writ omits altogether the mention of "estate,

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(a) 27th, Geo. III. c. 4, by which it is enacted, "that no process of attachment, except in the case of the *dernier equippeur*, according to the usage of the country, shall hereafter be issued for attaching the estate, debts, and effects of what nature soever, of any person or persons whomsoever, whether in the hands of the owner, the debtor or of a third person, prior to trial and judgment, except there be due proof on oath (to be indorsed on the writ of attachment) to the satisfaction of one of the judges of the court issuing the same, that the defendant or proprietor of the said debts and effects is indebted to the plaintiff in a sum exceeding ten pounds, and is about to secrete the same, or doth abscond, or doth suddenly intend to depart from the province with an intent to defraud his creditor or creditors, and that the defendant is then indebted to the plaintiff and he doth verily believe that he shall lose his debt or sustain damage without the benefit of such attachment,

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debts, and effects" as being the things to be attached, and substitutes a different description of things, viz. :—" Books of account, correspondence, &c." The writ, therefore, in its very frame, is illegal ; and on this ground alone ought to have been quashed by the court below. This ordinance again, as well as the pre-existing law, authorizes an attachment to be made of such estate, debts, and effects only, as are in the possession of the defendant, or in the hands of a third person belonging to him. The estate and effects of a defendant, in his possession, are attached by the actual seizure of them, and placing them in the custody of the officer by whom the attachment is made. When in the hands of third persons they are attached by a mere injunction on them, not to dispossess themselves of them. In this writ there has been a most dangerous and alarming violation of the law, as now stated. It does not, as required by law, command the sheriff to attach the things to be attached, in the possession of the defendants ; but commands him to attach them " in a certain designated building" and " elsewhere." This building is not alleged to have been in the possession of the defendants, and we are therefore justified in supposing it was not in their possession. In commanding the sheriff, therefore, to attach the things in question, in that building, the writ has violated the law, by commanding that to be done, which the law does not permit.— But the insertion of the word " elsewhere", has given a much wider extent to this extraordinary power ;— under this word, the sheriff has been commanded to attach the things which were to be attached, not only in this building, but in any and every dwelling-house,

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counting-house, shop, and place within the jurisdiction of the court, thus subjecting every merchant, shop keeper, and householder in the district of Montreal, to the capricious or malicious scrutinizing search of a sheriff's officer, and laying open to him the inmost recesses of his house, with the disclosure of the most secret transactions of his trade, business, and family, and of his whole life ; with all the humiliation and discredit incident to such a proceeding. The seizure of papers in England is illegal in all cases, and *Wilkes'* case excited there the strongest sensation. In that country the power of searching for and seizing papers in cases similar to his, was exercised under the warrant of a high and responsible officer, one of His Majesty's Secretaries of State, on a criminal charge of infrequent occurrence. Here, an indiscriminate search for papers, under civil process, has been sanctioned by the court below, a proceeding which, if sanctioned by this court, would continue in practice from day to day and be subversive of, and inconsistent with the security of the persons, reputations, and property of individuals in society. These objections apply to the writ intrinsically, there are others which are extrinsic to it. The grounds of insufficiency in the affidavit, under the ordinance, are several : the persons who, it is sworn in the affidavit, were secreting their debts and effects, were, Simon McGillivray and Thain. But it is also sworn therein, that these two individuals were absent, that McGill was curator to the former, and Richardson, to the latter. Now, as curators, Richardson and McGill were legally vested with, and had exclusively the possession of all the debts, estates, and effects be-

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longing to the absentees in this province, at the time of making the affidavit. The absentees could not, therefore, secrete things of which they had not the possession, and over which they could exercise no power; nor could an alleged secreting of effects by them in the district of Montreal,—in the nature of things impossible,—warrant the attachment of debts and effects in the hands of the curators, who, it is not pretended, were secreting them, and must be supposed to have held them in a course of legal administration. The absentees McGillivray and Thain, also, are not defendants, and their misconduct,—if such there were,—could not warrant an attachment against their innocent curators. The attachment of debts and effects, in the hands of their curators, could only be obtained on the ground of fraudulent conduct in the curators personally, such as is required by the ordinance. The alleged fraudulent secreting by the absentees, therefore, of estate, debts and effects, which were legally vested in their curators, and of which the latter had exclusively the possession and management, was manifestly inconsistent with reason, and could afford no ground for an attachment against the curators, the defendants in the action. No proof such as required by the ordinance, or any other proof, was indorsed on the writ of attachment: the affidavit not being indorsed thereon. It is not stated in the affidavit that, without the benefit of an attachment for attaching the estate, debts and effects, &c. the plaintiffs would lose their debt or sustain damage. The persons stated in the affidavit to be secreting their effects are *not the* defendants in the action; so that according to the principle upon which this attachment has been issued,

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the alleged fraudulent conduct of one man is made a ground for issuing an attachment against another. It is evident from the affidavit, taken in conjunction with the declaration, that no debt, at the time the affidavit was made, was due, either by the absentees McGillivray and Thain, or by their curators, to the plaintiffs. The debt sworn to in the affidavit is stated to be the amount of a promissory note granted by McGillivrays, Thain, & co. to the plaintiffs for £4000, but in the declaration, it is expressly stated, the plaintiffs, by the deed of assignment therein and above mentioned, *had accepted the estates, debts and property assigned to them in common with the other creditors, in full payment and satisfaction of that debt.* While the deed of assignment, therefore, an instrument in itself merely voidable, but not void until declared to be so by a judgment of the court, continued in force, there was no debt whatever due either from the absentees or from their curators, to the plaintiffs; and the affidavit in swearing to a promissory note, which by the plaintiff's own declaration had been satisfied and discharged, could not be *due proof*, or any proof at all, "to the satisfaction of a judge," that the absentees and their curators were indebted to the plaintiffs in a sum exceeding "ten pounds," or in any sum whatever. The order of the judge authorizing the issuing of the attachment was also illegal in many particulars, as in authorizing an attachment to issue without "due proof," as required by law; in directing the attachment to issue against certain things of persons not defendants in the action; in directing the attachment to issue not for attaching the estate, debts and effects, but for attaching "books of account, vouchers, wri-

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tings, documents, and securities for money and correspondence, and in controlling the execution of the King's writ, by laying an injunction,—extrinsic to the writ itself,—on the sheriff to execute it in a particular manner. If the attachment was illegal on these grounds, in what respects the defendants, it was not less illegal in what respects the garnishees, Richardson, Gerrard and Gregory. The estate debts and effects, in the hands of the latter, had belonged to McGillivray and Thain, the insolvent debtors, but by the deed of assignment mentioned in the declaration, they had ceased to belong to them, having been assigned to the gentlemen last named, as trustees, with the concurrence of the plaintiffs for their benefit, and that of the other creditors. As long as this deed continues in force, the trustees hold the assigned property in question for the benefit of the plaintiffs and the other creditors, to whom they are accountable for the due execution of the trust confided to them. Yet the estate, debts and effects so held by the trustees, as appears by the plaintiffs' own declaration, the plaintiffs by their strange proceeding by attachment, choose to consider as the estate, debts and effects of McGillivray and Thain. In the proceeding against the defendants, the plaintiffs would appear to have overlooked the important fact that there was no debt due to them by McGillivray and Thain; and in the proceeding against their own trustees as garnishees, they would appear not to have been aware that they were attaching, as belonging to other persons, their own property in the hands of their own agents specially selected and appointed.

For the respondents it was said, that upon reference

to the allegations contained in the declaration it would be seen that this attachment has not been made for the purpose of converting the things seized into money, but, as the respondents deny that any right existed in the pretended trustees, it is for the purpose of obtaining the books of account of the bankrupts, to prove a fraud which had been practised in relation to them, and to prevent a continuation of that fraud by falsification. The respondents were entitled to the possession of the books as containing the proofs, the *nomina debitorum* by which alone the *choses in action* of the insolvent estate could be discovered. The object of the ordinance was to repress fraud and every thing tending to that effect is within its purview. It, therefore, includes such process of the old French law as interfered in cases of mercantile fraud. The attachment in this case was a process well known in that law, the conservatory process of the *scellé*, the only general remedy in commercial matters, for specially including books and papers, it secures to the creditors the entire property of the debtor. The ordinance not repealing the old law, but regulating it, had in contemplation *four species* of attachment: the *saisie et exécution*, the *saisie arrêt*, the *saisie en revendication* and the *scellé*. The *arrêt simple*, which has been adverted to, was only a process in anticipation of execution, but the *scellé* was a general remedy, and must have been had in view by the framers of the ordinance, as well as others, and the respondents were entitled to the benefit of the attachment which had been issued, it being in the nature of a *scellé*. The words "estate, debts and effects," which, it has been said, except as respects the *saisie arrêt*, are confined to corporeal goods, include the

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french term *meubles*, which is not in many instances so restricted. It is true that in England *choses in action* are not liable to seizure, but in the United States where the words estate, debts and effects are used, personal property of all kinds, including securities, money and personal rights, are comprized. By the French law conservatory process was very frequently resorted to in mercantile cases, where although other process of attachment did not extend to books, accounts and papers, the *scellé* did, and was a concurrent remedy with the *saisie et exécution*, where the latter did not suffice. It existed long anterior to the ordinance of commerce of 1673, and is recognized by it. It did not require any *procès-verbal* or guardians, or permit of security being given, but as in this instance, secured the things seized without any inventory, to abide the order of the court. This remedy is borrowed from the Roman law, whereby the *bona* of an absconding debtor could be attached for the benefit of the creditors generally, and by the term *bona* was understood not merely corporeal, but the whole of the estate corporeal and incorporeal, or estate, debts and effects. Upon the whole, the *scellé* must be the very process contemplated by the ordinance; in proof of its being so it is to be observed, that an allegation of secreting the effects is required, whilst other *saisies* require only an affirmation of the debt. In cases of insolvency the first steps to be taken by the creditors, is to obtain the books to obviate fraud, falsification and embezzlement. This is done by the *scellé*, and it is stated by different writers, that by it effects may be got at which cannot be taken in execution. Its principal object is a distribution *pro rata*. The words estate, debts and effects, are used

in the English bankrupt law, within which are comprised books and accounts. The proceedings in England, in a case of this kind, would have been under a commission of bankruptcy; in Scotland, by means of a sequestration, and in France, by the *scellé*. In all of which, the main point is to secure the books of account. It has been argued that the things seized were not in possession of the debtors, but of third persons, we deny that any right was vested in the trustees; the property was in the bankrupts, and in a building where they carried on their business. It is competent to the respondents to shew that the deed of assignment was founded on fraud, and a nullity not voidable but void, it is so on the face of it, having been made by Simon McGilivray, who was not competent to make it, and from the fact of his not having put the creditors in possession of all the effects of the firm. Besides, Thomas Thain was no party to the assignment, and he cannot stand acquitted, Richardson stands here as his curator. On this and minor objections, as, 1. the affidavit not being indorsed on the writ, it is to be observed that it is annexed as a schedule. 2. the debt being not due, this is answered by stating that an affidavit of debt is sufficient. 3. that the garnishees are improperly brought in as being trustees, and in legal possession. We deny that they are trustees, and they are not mentioned as such in any of the proceedings. As to the place where property may be attached, *Pothier* says it may be taken wherever it can be found, *soit en ville, en campagne, dans les champs, en chemin*, and unless the property were shewn to be in the garnishees, the sheriff stands justified in what he has done, the premises were in the bankrupts possession, and were not trans-

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ferred by the assignment to the pretended trustees, and whatever rights the latter might possess, could not interfere with those of the creditors. If the trustees should be guilty of malversation, falsification or embezzlement, the creditors have their redress by a *saisie en revendication*. It has been said that it was impossible for McGillivray and Thain to be personally secreting their effects in this province, it was possible, however, for them to have done so by instructions to and through third persons *qui facit per alium facit per se*. The object of obtaining the correspondence and papers, is to shew that under the control of McGillivray, funds belonging to the creditors, had been misapplied, concealed and embezzled. No blame or malversation is ascribed to the curators as curators, but they are made parties as the legal representatives of those to whom such conduct has been attributed. If the books and papers are returned the fraud and falsification complained of will be proceeded in.

In reply it was contended that the attachment could be considered only as an *arrêt simple*. That it was an error to suppose the *scellé* an attachment and thence contemplated by the ordinance. Some of the effects of an attachment may arise from the *scellé*, but no writer has included it in the term of *saisie*. It is quite a different process. The *saisie* is an open and public process emanating from a court; the *scellé*, one of an arbitrary and secret nature derived from a judge alone and often used in France in a high handed and oppressive manner, and there gave rise to many complaints. The *saisie* secures property for payment of a particular debt whilst the *scellé* is resorted to for the benefit of all concerned, heirs, widows, orphans, exe-

cutors and creditors. It can be resorted to by creditors during the life of the debtor in case of bankruptcy or absence ; but as a civil remedy it can only be on a *titre exécutoire*, a judgment debt. It is only on proof of fraud on the part of the debtor that it can be had previous to judgment, which brings it under the head of criminal law. It can only be a part of the law of this country so far as it is a civil remedy, the instant it becomes a criminal process it is not,—a distinction which has not been adverted to. In this case there is no judgment debt ; as a civil remedy, therefore it does not apply, and as a criminal proceeding the law of the land will not allow it. *Pothier*, in his *Procédure Civile*, marks the difference between attachments (*saisies*) and the *scellé*. The *saisie* is executed by a *huissier* and the *scellé* by a judge or *commissaire*. The forms are essentially different. The *saisie* secures certain effects for the satisfaction of a debt, the *scellé* is to prevent an entire estate from being left *à l'abandon* and to secure it for all concerned. The *scellé* takes place when the debtor is dead or absent, the *saisie* when he is alive and present. In fact the *scellé* was not thought of when the process in question was issued, and was not mentioned as a process of attachment. The words "let process of attachment issue" were in the writ which the sheriff was directed to execute. The judge who granted the writ must have known that a *scellé* could not be executed by a sheriff, and if he had intended it for a *scellé*, he would have attended in person to affix the seals. Had this writ been in proper form the sheriff would have found that he had no right to pass the threshold of a building in possession of third persons, without rendering himself

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liable to an action of damages. It was a happy circumstance that in this violent and illegal proceeding no blood had been shed. If the sheriff's officer had been resisted and killed in the execution of this process it would have been justifiable homicide, or under some circumstances have amounted to manslaughter, but not murder. If on the contrary, life had been taken by the sheriff or his officer, it would have been murder. It is remarkable that the mass of creditors had confided in men of known honor and respectability, and but one out of the whole came forward to wrest the books and accounts from their possession.

SEWELL, CH. J. The merits being wholly out of the question, the case rests entirely upon the writ of attachment, and the circumstances under which it was issued. It is the ordinance of 1787, and the French laws which existed at the conquest, and were secured by the capitulation, that must govern the question. If the proceedings were found consistent with either, the motion must be quashed; if with neither, it must be maintained. As to the ordinance of 1787, the proceedings were in several points at variance with that law. The writ of attachment did not follow the words of the statute; it should have been against estate, debts and effects, and have left to the plaintiff, at his own risk, to direct the sheriff what to take and then to the court to determine, whether the things taken were within the scope of the law. The writ should further have directed the property to be seized in the hands of some particular person,—the property must be in possession of somebody, either of the debtor or of third persons, and if in the hands of third persons not only must those third persons be summoned,

but the debtor must be served with the writ and declaration that he likewise may appear. In this case the judge has given a writ of attachment to seize certain things in a certain building, or elsewhere, without specifying in whose possession it is to be seized ; and goes still further, adding an injunction to the sheriff to retain the things seized, in his custody, to abide the decision of the court : all which is in direct opposition to the letter of the ordinance, and to the provision of the law by which the party seized upon is entitled to have his things restored upon giving security. The writ of attachment is therefore clearly illegal under the ordinance of 1787. As to the old French law, on which the respondents profess to have founded their proceedings, it appears that in case of bankruptcy, the property was to be secured, not by an *arrêt simple* or any other *arrêt*, but by the *scellé*, which did not dispossess the party of his property and papers, but placed them in such a situation that no one could touch or inspect them, until the time arrived when the court should determine whether they were to be given up to the creditor, or returned to the debtor. This was done by the sealing up of the receptacles, chambers, and places, in which the property was, and was done by the judge in person, or by a commissaire, (a kind of deputy-judge, to whom we have no counterpart in our jurisprudence,) so that it could not be done by any ministerial officer ; and in addition, a guardian was placed to see that the seals were not broken, and the property and papers not touched. Now, the practice resorted to in this case has been singularly different, supposing this proceeding, as is alleged, to be in the nature of a *scellé*. The judge

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delegates a power to the sheriff, which under that law, he could only exercise in person ; and the property, in lieu of remaining safe, under the seals of the court, is left in the hands of a ministerial officer. So that, whether it be considered as a process under the ordinance of 1787, or under the French law, as it existed before the conquest, the issuing of the attachment, as it stands, cannot be maintained. To refrain from remarking on minor circumstances, the fatal objections to the mode of proceeding followed, are : 1. Instead of a special writ, a general one has been issued, without discriminating any person, as in possession ; and without summoning any person as defendant, and without using the words of the law as to what was to be seized under it. 2. The injunction to the sheriff, to hold the things in his custody is directly contrary to the ordinance and the provision that, upon security being given, they must be restored. 3. If these proceedings were to be founded on the law existing before the conquest, the forms of proceeding by the *scellé*, under that law, should have been observed, so that the property might remain under the seal of the court, thus avoiding the irregularity which now destroys them. 4. That on the face of the declaration there appears to be a deed of assignment, whereby as long as it remains in force, which must be till it is rescinded by the court, the debt sworn to is cancelled.

KERR, *Justice*. The writ of attachment in this case is certainly an anomaly and pursued neither the one form nor the other. It has been a question whether books of account and papers come under the description of estate, debts and effects. Books certainly are evidence on which claims are founded, but they pos-

sess no intrinsic value, and the true test of their not coming within the meaning of the words estate and effects is, that they cannot be sold under execution or seized previous to judgment; neither are they debts although they constitute the proof of debts. They thus are exempted from seizure by the ordinance, which is perfectly precise and conclusive in its enactments. In England a defendant cannot be compelled to produce his books. A court of equity might, under very strong circumstances, compel the production of books and accounts, but a court of law could not, and we have no court of equity in Canada. The writ is perfectly illegal, and the opinion of this court is that the judgment of the court below must be reversed with costs.*

For the appellant, the *Attorney General*,—For the respondents, *A. Stuart and Walker*.

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* The above judgment was rendered on the 20th day of November 1829. McKenzie, a creditor of the firm of McGillivrays, Thain & co. who had obtained a judgment in the Court of King's Bench at Montreal, against the legal representatives of that firm, presented a petition bearing date the 21st November, to one of the judges of that court, praying for the reasons therein contained, that seals (*le scellé*) might be put and affixed upon certain books of account, papers, muniments, vouchers and effects,—which were the same as those mentioned in the writ of attachment in the above case. On the 24th of November, the truth of the facts stated in the petition were substantiated by affidavit, and on the same day the Hon. Norman Fitzgerald Uniacke, one of the justices of the court of King's Bench proceeded to the building described in the writ of attachment, and affixed the seals of the court upon the premises, and named guardians to preserve the seals. On the 25th of November a service of the above judgment of the court of appeals was made upon the sheriff of the district of Montreal, at the instance of the appellant, and a demand made upon him to discharge the attachment and deliver up the keys of the building in St. Gabriel street, to which he replied that he had already seen the judgment,—that the adversaries of the appellants had got the start of them, and that the deputy sheriff had delivered over the keys of the building to Mr. Uniacke. Upon these facts, substantiated by affidavit, and certified copies of the documents above mentioned,

If a motion to set aside an attachment, by the sheriff, of books of account and papers, be rejected in a court of original jurisdiction, and its judgment to that effect reversed in appeal, the court of appeals will not grant a rule for an attachment against a judge for putting a *scellé* upon such books and papers before they are restored by the sheriff to the person in whose possession they were for that purpose, or against the party and his Attorney at whose instance the *scellé* was carried into execution.

were seized, against the sheriff for delivering them to the judge for that purpose, or against the party and his Attorney at whose instance the *scellé* was carried into execution.

ON APPEAL FROM MONTREAL.

DENIS BENJAMIN VIGER *et ux*.....*Appellants.*
and

30th April,
1830.

TOUSSAINT POTHIER.....*Respondent.*

A testator,
at the time of
his decease,
possessed of
property be-

IN the year 1764 Pierre Foretier was married to Therese Legrand, who died in 1784, leaving several belonging to the succession of his wife, deceased, by an holograph will bequeaths all the property of which he might die seized to his heirs and legatees, who were also his wife's heirs, under the penalty, if any of them contested his will, that their share in his succession should be forfeited. He names two executors or trustees, and the survivor of them, for the administration of all his property until a partition. In the making of such partition he directs his executors to act for some of the legatees who were minors, and for another who was married,—without the authority of her husband for that purpose being requisite,—and whose share they should administer during the husband's life paying her the rents, &c. :—Held, that the will is valid, but that its dispositions can be carried into effect only so far as they affect the succession of the testator, and that they could not in any manner apply to the succession of the testator's wife of which his legatees were the heirs, and of which they were, in law, seized from the day of her death, and that one of the executors having renounced the execution of the will the other had saisine of the testator's succession to carry his will into effect.

To an action against several heirs it is not a valid objection that all of them were not originally made defendants if in the progress of the suit they have been made parties by an interlocutory judgment of the court.

an application was made to the court of appeals for a rule, to shew cause why an attachment should not issue against the judge who executed the *scellé*, for having by means of an usurped jurisdiction, and by colour of a judicial proceeding, obstructed the judgment of the court, bearing date the 20th day of November then last, and assisted in preventing the restitution of the books of account, &c., according to the purport of the said judgment, &c. An application to the same effect was made for a rule upon McKenzie, his Attorney, and the sheriff of the district of Montreal. The appellant having been heard by his Counsel,

Per curiam. We are of opinion that no attachment can issue. In the first place this court gave no direction to the sheriff to deliver up the property, but merely reversed the judgment and sent it back to the court below, to do what to law and justice might appertain. It did not appear that any thing further had been done in the court below, but a new party, another creditor, had come forward and instituted another proceeding.—The former was by *saisie-arrêt*, the present one by *scellé*; this last, a judge sitting out of court, is obliged upon application, to grant and execute. The whole proceeding may be illegal and contrary to law, but it has nothing to do with the former case, and the motion must be discharged.

daughters, issue of their marriage. Her succession was composed of her share in the matrimonial community and of estates of the nature of *propres*. In 1785 Foretier made an inventory of her succession and retained possession of the same with the rents, issues and profits, until the day of his decease on the 3rd day of December 1815. By his last will and testament holograph, bearing date the 20th October 1814, after making several specific legacies, he bequeathed the surplus of all his property to his children and grand children, whom he instituted his heirs and universal legatees, to be distributed among them in conformity with the law of succession : he declared " that Marie Léocadie Foucher should have one share, Therese Heney and Hugh Heney one share, Marie Marguerite Foretier and Marie Amable Foretier, wife of Denis Benjamin Viger, each one share, or their children by representation if they died before him. In a codicil bearing date the 6th day of August 1815, the testator declares it to be his intention, that if any of his children or grand children should in any manner contest his will, under any pretext whatsoever, that they should be altogether deprived of any share in his succession ; in such case formally disinheriting them and giving their share to his other children and grand children. For the purpose of carrying this will into effect he named Toussaint Pothier and Hugh Heney his executors, divesting himself, in their favor, of all his estate, authorizing them to administer the same until a partition should be made among the heirs. He directed the executors, or the survivor of them, to sell, as they might see fit, such immoveable estate as might be necessary to effect a partition, and in such,

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partition he authorized the said two executors, or the survivor of them, to stipulate, act for, and represent such of his said legatees who were minors, as well as Marie Amable Foretier, wife of Denis Benjamin Viger, without its being requisite for the validity of such partition, that a tutor to the said minors should be elected or that the said Marie Amable Foretier should be authorized by Denis Benjamin Viger, her husband, or by judicial authority. After partition made he directed that his executors, or the survivor of them, should have the administration and receive the revenues of the minors until their marriage, or until they were of age, &c. also that the executors or the survivor of them should have the management and administration of the property and the exclusive collection of the revenue of the share which, upon the partition, would fall to Marie Amable Foretier, and this during the life of Denis Benjamin Viger, and if she survived him she should have, at his decease, the free administration and property of and in the estate which would fall to her from this will. During the administration by the executors, the amount of revenues &c. were to be paid to the said Amable Foretier, to herself and to no other, quarterly, and upon her receipt merely. The executors were also entrusted with the care of the estate of Marie Julie Foretier during her life or until her marriage." After the testator's death, on the 20th December, 1815, by an instrument executed before Guy and another, public notaries, the heirs acknowledged the will to be of the testator's hand writing, and the signature affixed to it to be his, with a reservation of their rights and without admitting the validity of the will. Heney

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having renounced the execution of the will, an action was instituted by Pothier the respondent, as executor, and in virtue of the trust or *fidei commissum* with which he was charged, against the heirs who had taken possession of all the testator's property. The conclusions of the declaration were,—“ for a *scellé*, that the will and codicils should be established and the execution thereof ordered, that if the legatees should contest the will their interest under it might be declared forfeited. That as executor and trustee the plaintiff should, by the judgment of the court, be and remain seized of the estates of the testator in conformity with the will. That the defendants be adjudged to deliver to the plaintiff all the moveables, written securities, &c. with an injunction on them not to molest the plaintiff in the execution of the will. That an inventory be made and that the defendants do pay to the plaintiffs £5000. damages.” In the progress of the suit the *scellé* was set aside. An inventory was made by the heirs, of all the property left by Foretier, and the moveable property sold. The appellant pleaded by exception,—“ that Hugh Heney should have joined the plaintiff in bringing this action. That it was not sufficiently alleged in the declaration that Hugh Heney had renounced the execution of the will and the trust thereby reposed in him. The non joinder of Marie Therese Heney as a co-defendant was alleged; also that the acknowledgment of the will, mentioned in the declaration as having been made by the heirs, and the deposit of it before a notary, were illegal. That the plaintiff had no *saisine* under the will, that in the estates of which the testator died seized was comprized the succession of Therese Legrand to which the de-

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defendants were heirs and therefore the trustee had no claim to it. That the plaintiff could claim only so much of the estate as would suffice to pay the legacies. That an inventory had been made by the defendants who were legally in possession, that the defendants had paid all the legacies except one which was illegal. That if the plaintiff had any right of action he had mistaken the kind of action it was competent to him to institute. That there was no ground for a demand of damages, that the disinheriting of the defendants could not be demanded by the plaintiff, the clause in the will on which it was founded being null, and that the conclusions of the declaration were irregular." Issue upon the pleadings having been joined, the parties were heard on the merits on the 11th April 1822, and on the 20th February 1824, an interlocutory judgment was pronounced ordering that Etienne Mayrand and Marie Therese Heney, his wife, should be made parties to the action. They accordingly intervened and prayed that final judgment might be rendered in the cause in the state it then was. On the 9th of June, 1824, another interlocutory judgment was pronounced by which the court ordered "that by parties conversant with legal proceedings (*praticiens*) an account of the conjugal community between the testator and Therese Legrand should be made exhibiting the rights of the parties in that community." *Praticiens* were named but no steps were taken to carry the interlocutor into effect,—on the 20th April, 1826, a motion was made, on the part of Mayrand and wife and Durocher and wife, to set aside this interlocutory judgment, and on the 2nd of June following a motion to the same effect was made

by the respondents. The reasons assigned in the latter motion were, 1. That the execution of the will, which was admitted by the defendants, ought to be provisionally ordered by the court, whereas the interlocutor had the effect of retarding it. 2. Because all the estates left by the testator are considered in law to be part of his succession, and the respondent as executor was legally seized of those estates. 3. Because the defendants being heirs of the testator and of Therese Legrand a confusion of rights had been operated in their persons precluding them from exercising rights against themselves for their shares in the two successions, and because no partition as contemplated by the interlocutor could be had, but a partition only in conformity with the will. 4. Because the succession of Therese Legrand being, by the will, united with the testator's, no partition as ordered by the interlocutor could be made. The parties having been heard on these motions, the court, by a judgment of the 20th February 1827, wherein its reasons were assigned for so doing, set aside the interlocutor, declaring that the paternal and maternal successions, of which the defendants were the heirs, had become but one and the same, that the will and codicils should be executed according to their form and tenor, and that the respondent, as sole executor and administrator, should be seized of all the estate left by Foretier at his death, to administer and regulate the same according to the will of the testator. From this judgment this appeal was instituted.

Viger in person, one of the appellants, having been heard on their behalf, and *The Attorney General* contra.

* *KERR, Justice.* The first question presented to us

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is whether proof of the testator's will has been offered? I am of opinion, that as all the parties attended at a notary's office and formally admitted the instrument there deposited, to be the holograph will of Foretier, they are now estopped from denying that it is the testamentary devise of that gentleman. Admissions of matters of fact by parties concerned, who are most likely to know, it is said by Lord *Hardwicke* (a) are stronger than if the facts had been determined by a jury. Being thus admitted, the next question follows, what is the rule of construction as applicable to all wills? Numerous authorities from French authors shew, that the intention of the testator alone, governs the construction of his will, and indeed it would be a solecism in language to call it the testator's will if it were not construed according to his intention. The English law, in perfect accordance with these authorities, furnishes many didactical rules of construction strongly applicable to the case. A late writer says, "there is only one general rule of construction for courts of law and equity applicable to all wills, however the court may condemn the object, the intention is to be collected from the whole will, every word is to have effect according to the natural common import." The court is bound to carry the will into effect, if consistent with the rules of law, and if it can see a general intention consistent with the rules of law, but the particular mode is not, though that shall fail, the general intention shall have effect," (b)—"There is no certain rule in cases arising in the construction of a will, they must be alone construed according to the particular words,

(a) 1 Atkyns, 629.

(b) 4 Ves. 329. Com. Dig. vol. 8. Appx. 409.

the circumstances, or views of the testator." "For the purposes of collecting the intention, every part of the will must be considered." (a) But the precepts particularly applicable to this case are, "a will is not to be construed by something *dehors*, as by the state of property, where there is no latent ambiguity, (b).— Again, "If the testator might not have contemplated the event, that will not affect the construction," (c) "inconvenience attending the carrying into effect a particular disposition by will, is not a sufficient reason for controlling its obvious construction." (d) Few wills can be conceived in clearer or less ambiguous words than the will of the testator Foretier. This will has not been carried into effect, but its execution opposed for these fifteen years, and his designs frustrated by the very persons who were objects of his bounty.— The appellants have urged as an excuse, for their having taken possession of all the testator's real and personal estate, his having devised the succession of his wife, in which they had a share. If this argument could avail any thing, it could only be so far as respects that portion of the estate over which he had no control, and not render nugatory the devise of the remainder which belonged to himself, and affords no reason why that devise should not be carried into complete effect. The appellants appear to be under an error in supposing that a confirmation of the judgment of the court below will divest them of their claim to a share in the succession of Therèse Legrand. It is true that it declares the will and codicil must be executed according to their form and tenor, that is, that

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(a) 1 Ball and Beat 409, 460.
 (c) 7 Ves. 369.

(b) 3 Mer. 316, 409.
 (d) 1 Mer. 417.

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the whole property of which the testator died seized, including Therèse Legrand's (which he had quietly possessed for 30 years, and might have presumed to belong to himself,) should pass to his fiduciary legatee, subject to such claims as legally attached to it in his life time. Of course the judgment does not place the appellants in a position less favorable than they held when the testator was alive. But even if the appellants had surrendered their interest in the succession of Therèse Legrand, they would have shewn more respect to the testator's memory, and facilitated the execution of his will; and as they have obtained forcible possession of both estates, I am of opinion, that they have submitted no solid ground of objection to the demand of the executor in his character of fiduciary legatee, and that he ought to be put into possession of all the property of which Foretier died seized.

Many objections have been taken to the proceedings in this action, as that Mayrand and wife were not originally parties. They were called in afterwards and took part in the proceedings, and here the maxim *consensus tollit errorem*, emphatically applies. Another objection is that the court below pronounced an interlocutor, which was rescinded by the final judgment, but the rule applicable to interlocutory judgments of this description is stated by Voet, *quæ et postea per supervenientem definitivam retractari potest, in quo à definitiva differt*. It has been also objected, plausibly enough, that we must look to the conclusions of the declaration, where we will find that more has been granted by the court below, than is demanded by them: that as the plaintiff has not asked to be put into possession, but that the court should declare him *saisi*, they had decided *ultra*

petita and actually granted to him *saisine* of the estates, which he had not before. If the statutes 14th and 41st of His late Majesty, (a) had not operated a complete change in the law, so far as respects testamentary dispositions, there might be some force in this objection, but these acts giving to all his Majesty's subjects a right to dispose of their property, real and personal, by last will and testament, it is no longer a question how far *l'institution d'héritier* is not competent to every one who has property; the state of things is no longer the same as before these acts, and it is wisely said that as law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters. "On appelle,"—says the *Repertoire de Jurisprudence*,—"institution d'héritier, la nomination ou designation de ceux qui doit succéder à tous les droits actifs et passifs d'un défunt." And further "un hérité se défère de deux manières, par la volonté de l'homme ou la disposition de la loi." If the institution of an heir by last will and testament in this province mean any thing, it must import that as soon as the testator dies his estate passes by the *hæres natus*, and vests in the *hæres factus* on whom he has conferred it. Were it otherwise it would be a departure from the prescribed rule, *semper vestigia voluntatis sequimur testatorum*, and be a violation of all consistency and common sense, for it would make the law declare that it upheld the testator's intention of giving his estate to his *hæres factus*, when it actually vested it in the *hæres natus*, or in other words, that though Foretier's intention to give his estate to the respondent, his fiduciary

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(a) See *Supra*, 103, and 233 in notis.

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legatee, was manifest, for the purposes of his will, the law declared it to be actually vested in the appellants, from whom the respondent could only hope to divest it after a struggle of many years. Nor is this view of the law as applicable to this case, without indirect authority, as well as supported by the inference necessarily to be drawn from the principle that the intention of the testator is to be the guide in construing a will, for *Bourjon* says, “l’institution d’héritier n’ayant pas lieu par testament, tous legs soit universels, soit particuliers est sujet à délivrance,” and further on, “en effet par la mort du testateur tous ses biens, pour ainsi dire, volent dans la main de son héritier. C’est ce que la coutume exprime fortement par ces mots *le mort saisit le vif*. (a) By the words *l’institution d’héritier n’ayant pas lieu par testament* he plainly indicates that the doctrine of *délivrance de legs* either to the instituted heir or to the universal legatee, is a creature of the law, as it existed before a power was given to all men to bequeath their estates by will, from which we must necessarily deduce this conclusion, that the instituted heir or universal legatee under the altered and new system being substituted *loco hæredis nati*, the maxim *le mort saisit le vif* disappears, and the testator’s estate, at the instant of his death, becomes virtually transferred to the universal legatee subject to all the claims and incumbrances to which it was liable during his life. I am supported in this opinion by the *Napoleon* code which has been dictated by a new and enlightened policy. The 1006th rule of the chapter on wills is in these words, “lorsqu’au décès du testateur

(a) 2 *Bourjon*, 329. ✕

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il n'y aura pas d'héritier auquel un quotité des biens soit réservée par la loi, le légataire universel sera saisi de plein droit par la mort du testateur, sans être tenu de demander la délivrance." Although the respondent, owing to the opposition he has met with, has not, as fiduciary legatee, obtained actual and available possession of the testator's estate, he had, in a legal construction, possession of all the property of which he was seized at his death, so that the court below in awarding the conclusion *être déclaré saisi* have not, in my opinion, proceeded beyond the demand in the conclusions of the respondent. I should add that the reasons contained in the judgment of the court below, have had no weight on my mind: it is the decretal part alone of which I approve, and that I am of opinion, ought to be confirmed, leaving it open to the appellants, when the respondent shall have obtained actual possession of the entire estate, to take such course as they may be advised to divest the fiduciary legatee of the succession of Therèse Legrand. Thus, carrying into effect the will of the testator, so far as the law will permit, and at the same time protecting the appellants from any prejudice to the recovery of their just rights.

STEWART, *Executive Councillor*, concurred in the foregoing opinion.

SEWELL, CH. J. In this case we have to pronounce upon the legality and the effect in law, of the will of the late Pierre Foretier, upon the respective claims and pretensions of his heirs, the appellants, and of his executor the respondent. It is to be observed that in the course of this long protracted suit, the *scellé* has been removed, that an inventory of the property possessed by the testator, at his decease, has been made,



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and his moveables sold, proceedings in which the respondent has acquiesced, and that so much of the judgment of the court below as rejected the conclusions for a forfeiture of the appellant's share in the testator's estate, and for damages, is unimpeached.— The only points now in discussion, are, 1. the validity and legal effect of the will. 2. the extent of the executor's *saisine*. For whether the heirs are bound to restore to the executor the moveable property, if any they have, belonging to the estate of the testator, whether they be enjoined not to sell them, or receive any debts due to the testator's estate, and not to molest the respondent in the execution of the will, are questions entirely depending on these two points. The validity of the will depends upon its form and its context. In its form it is an holograph will which the law sanctions, and it is formally admitted by all parties to have been entirely written and signed by the testator. As to its context, it has been urged that the will is entirely null and void, but no sufficient reason has been assigned to shew that it is so. Foretier had an undoubted right to dispose of his own property, and also to disinherit his heirs if he saw fit, in the first instance; and consequently he had a right to disinherit them upon a contingent event, which was to depend upon themselves, we cannot, therefore, say that the will is entirely null. But we are, nevertheless, of opinion that the testator could not bequeath or transfer any other than the property which was veated in himself on the day of his decease, and that the provisions of the will cannot in any manner affect any property then in his possession, which was vested in the heirs of Therèse Legrand, and this was the case not only as to

all the property which were *propres* in her succession; but also as to that part of it which formed her share in the conjugal community existing between her and the testator. In both these instances the possession of the testator was merely *de facto*. The "*possession civile*" was in the heirs of Therèse Legrand, and from the moment of her decease all her property was vested in her heirs, "le mort saisit le vif," and, therefore, as the testator could not dispose of their property by will, he unquestionably could not affect it by any of the conditions which he endeavoured to impose upon it. Then as respects the second point, "whether the respondent is, or is not entitled to the saisine and possession of all the property of which Foretier was possessed on the day of his decease." And here we must observe that the power of the executor over property bequeathed, cannot exceed the power of the testator over the same property. If then Foretier had no power to transfer the property of Therèse Legrand, he could have no power to vest it in his executor in trust for the purposes of his will, nor do the words of the will in fact, shew that such was his intention, on the contrary they prove that it was his intention to vest in his executor his own estate and succession, his words are "I name Toussaint Pothier, Esquire, and Hugh Heney, my grand son, into whose possession I divest myself of all my property, authorizing the said executors to administer *the said property* until a partition shall be made among my heirs." We are, therefore, of opinion that under the will, the respondent is entitled only to the saisine and possession of the property which constitutes, exclusively, the succession of Fore-

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tier, that is, of that portion of the property in his possession on the day of his decease, and which will remain after subtracting therefrom the *propres* of Thérèse Legrand, and her moiety of the conjugal community; and after deducting from the other moiety of the same community, belonging to the testator, so much as may be due to her heirs for any alienations of property which he may have made, for the rents, issues and profits of *her propres*, and of her share in the community which he may have received. To return to the matters above stated to be dependant upon the decision of these questions.—It follows, of course, that the heirs are bound to restore to the executor the property,—if they have any in their hands which may be found to belong to the estate and succession of Pierre Foretier,—when established in the manner above mentioned: that they cannot sell any property of this description: that they cannot receive any debt due, exclusively, to the succession of Pierre Foretier, and that they cannot be permitted to molest the executor in the lawful execution of the will, as to the succession of Foretier.

This court has not failed to give the attention due to the reasons assigned by the court below in support of their judgment, “That the said defendants were heirs of the said Pierre Foretier, and that in virtue of the will, codicil and testamentary dispositions of the said Pierre Foretier, and according to the disposition of the same, the said defendants have intermeddled with the succession of the said Pierre Foretier, and have acted as heirs under the will, the only quality they could assume, and have thereby bound and obliged themselves to accomplish and fulfil without

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deviation all the charges and conditions imposed by the said will, codicil and testamentary dispositions, and could no longer legally contest the same. That in accepting the said succession by will of the said Pierre Foretier, the two successions, paternal and maternal, to which the said defendants are heirs, have been blended together and form but one and the same succession." But after a diligent examination of the record we do not find any evidence by which they would be warranted in drawing these conclusions; on the contrary, we find that the heirs have uniformly denied the validity of the will, except as to its form, admitting the handwriting and the signature, but no more, and that they have intermeddled, not as Foretier's legatees, but as the heirs of Therese Legrand. This appears particularly from the instrument of the 20th December, 1815, wherein the heirs reserve "their rights as heirs respectively and without its being considered in any manner to prejudice them, and without, on their part, admitting the validity of the said will, codicil, and dispositions by will, or the validity of any of the clauses or dispositions therein contained," and from the answer of the heirs to the notarial summons on the 23rd of January 1823, by which they were required by the respondent to proceed with him as executor to make an inventory of all the property possessed by Foretier at his decease; in this answer they refer to the above instrument and state, "that being seized, as well in fact as in law, of the property left by the said Pierre Foretier, composed as they have already informed the said Sieur Pothier of different successions, they have, of themselves, already commenced an inventory which is in

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progress and consequently they oppose such inventory being proceeded in by the said *Sieur Pothier*."

For these several reasons the judgment of this court is, that so much of the judgment of the court below as declares that the appellants in virtue of the will, codicil, &c. as already stated, and their order in consequence, that the said holograph will of the said *Pierre Foretier* should be executed according to its form and tenor, and that the respondent should be seized of all the property left by the said *Pierre Foretier*, as sole executor of the said will and as administrator, to manage the same until the entire accomplishment of the intentions of the said *Pierre Foretier*, and also so much of the said judgment as declares the appellants accountable to the respondent for all the estates, moveable effects, &c. possessed by the said *Pierre Foretier* at the time of his death according to an inventory, &c. mentioned in the said judgment, and also so much of the same judgment as dismisses all the exceptions fyled by the appellants and condemns them to pay costs, be and the same is hereby reversed and declared to be of no effect, with costs to the appellant in this court and in the court below against the respondent in his quality of executor,—and by this court it is adjudged that the said holograph will and codicils are good and valid so far as they relate to the estate and succession of the said *Pierre Foretier* only, and that the said will and codicil are null and void so far as they relate to the succession of *Therese Legrand*, and accordingly it is ordered that the said holograph will and testamentary dispositions be carried into effect so far as they relate to the succession of the said *Pierre Foretier* exclusively, and by this

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court it is further adjudged that the respondent, as sole executor of the said will and testamentary dispositions, is entitled to the saisine of the estate and succession of the said Pierre Foretier, and that he is not entitled to the saisine of the estate and succession of Therese Legrand, or of any property not exclusively part and portion of the estate and succession of the said Pierre Foretier, and that the appellants do deliver unto the respondent, as executor, all the moveables, titles, &c. belonging to his estate and succession in their possession, hereby enjoining the said appellants not to trouble or molest the respondent in the lawful administration of the estate and succession of the said Pierre Foretier according to the tenor of this judgment, and it is lastly adjudged by this court that the conclusions of the respondent's declaration praying that such of the heirs of the said Pierre Foretier as should contest the said will be declared to have forfeited their share under the said will, and for £5000. damages be dismissed. And that so much of the exceptions of the appellants as pray that the action of the respondent be dismissed because Therèse Heney and her husband were not originally made parties to the suit, and because it was not sufficiently alleged in the declaration that Hugh Heney had renounced the execution of the will, be and the same is hereby dismissed.

JAMES ROGERSON AND OTHERS..... ..Appellants.  
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10th & 14th ISAAC CORRIE REID..... ..Respondent.  
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A mercantile house at Newry directs a house at Quebec, to contract for the building of a ship, for which they,—the Newry house,—would send out the rigging. The Quebec house enter into a contract with some ship-builders accordingly.—The Newry house then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Quebec house: held, that the property in it was vested in the Newry house, and that the Quebec house had a right to re-

**T**HE Respondent, on the 3d July 1826, instituted an action of *revendication* against the appellant for the recovery of some anchors and rigging; and on the same day the articles were seized by the sheriff under a writ of attachment, or *saisie de revendication*, sued out by the respondent. The appellant pleaded the general issue. The facts in evidence, undisputed by either party, established that it is usual for British merchants to give orders for building of ships to merchants, resident at Canada, as agents on commission; and for the Canadian merchant to contract with the builder to advance him the requisite monies, according to the terms of contracting for materials and work in the colony, and to draw from time to time for such advances on the British merchant, and for the British merchant to send out to the Canadian merchant the necessary rigging for the ship, and also a master to superintend the building of it, and navigate it to Europe. Messrs. Henry and Reid, merchants, resident at Newry in Ireland, by a letter dated 23d August 1825, directed the appellants, merchants resident at Quebec, “to contract for the building of a vessel to

tain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of Custom house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house.

be called the Ocean, to be complete in cabin, and every other thing except the rigging; and they desired to be advised in good time of the appellants having made the contract, so as to be able to send out the rigging; and they agreed to allow the appellants two and a half per cent commission for their trouble. Captain Maxwell was to have the command." The appellants contracted with some ship builders at Quebec for the building a vessel according to this order, and on the 26th of April, in the following year, when it was partly built, they took an assignment of it from the builders; they soon after registered it in the name of a partner in a branch of their house established at Greenock. Maxwell came to Quebec in the spring of the same year, with a letter to the appellants from Henry and Reid, directing them "to supply him with any money he might require for outfits, and to obtain the certificate of registry, so that they might register her on her arrival in Europe." Maxwell on his way to Canada from Newry, had stopped at Liverpool, and there took the respondent, who was the Liverpool correspondent of Henry and Reid, to Messrs. Brown, Logan & co. and ordered the rigging in question. On his arrival Maxwell was employed to superintend the building of the ship. The rigging arrived at Quebec on the 21st May, with an invoice made out in the name of the respondent, and a bill of lading, expressing that it had been shipped by the respondent, and was to be delivered to "Capt. Thos. Maxwell, ship Ocean, at Messrs. Rogerson, Hunter & co.'s" (the appellants.) It was deposited in the appellant's warehouses, and they paid the Custom house duties and other charges on it. In the June following they dis-

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missed Maxwell, the master of the ship, and an account was then made out between "The bark Ocean, and owners, and captain Thomas Maxwell," in which his wages and expenses from the time of leaving Ireland, were balanced against the sums which had been advanced to him by the respondent, as the agent of Henry and Reid at Liverpool, and by the appellants since his arrival at Quebec; but no mention was made of the money which they had paid for the duties and other charges on the rigging. The amount of the balance was paid by the appellants to Maxwell. In May 1826, the house of Henry and Reid stopped payment, the appellants being then in advance on their account for the building of the ship. Thus far the facts of the case were undisputed; but some difficulty arose on the evidence of Maxwell. He deposed, that on the arrival of the rigging he entered it at the custom-house, and that it was landed under his direction: that he then removed some of it to Molson's wharf, and went immediately to procure store room for the rest of it; but on his return he found that one of the partners of the appellants' house had removed the articles he had left: That the same partner afterwards borrowed a bower chain, which he,—Maxwell,—had removed, under the pretence of lending it, but he put it into the appellants' stores: that the respondent had desired the rigging to be delivered to him,—Maxwell,—and had sent them out for the purpose of being employed upon a vessel, provided they were paid for: that he,—Maxwell,—was agent for the respondent, whose letter of instructions to him was, that he should hold the goods until he received security for the payment for him, and that he had given the appellants no permission whatever to

take away the rigging, intending to keep it in obedience to the respondent's letter of instructions: that on his producing, at the request of one of the partners in the appellants' house, the invoice and bill of lading, the partner retained and refused to return them, though asked repeatedly for them: that when he ordered the goods, the respondent as well as Brown, Logan & co. understood from him that the goods were intended for the vessel then building for Henry and Reid, and that the goods in question were given by the house of Brown, Logan & Co. on the credit of the respondent, who was debited in their books for the amount. The appellants, to invalidate his evidence, proved by the captain of the vessel who had brought out the rigging, that Maxwell had given him to understand that it was for a ship building in Quebec; by that of one of their own clerks, that Maxwell had, without any objection, delivered to him the invoice and bill of lading on his application for them, by the orders of the appellants, three weeks or a month after the settlement of the account; and by that of a ship builder of Quebec, that he had applied to Maxwell for an anchor, sent out for the Ocean, with a view of purchasing it: that Maxwell told him he should be glad to exchange it for a lighter one, but that he could not take upon himself to do so, and directed him to apply to the managing partner of the appellants' house, who he said was in charge of the anchor, it having been sent out for a vessel built by them, and that he,—Maxwell,—had no authority to dispose of the same. The Court of King's Bench, on the 20th February 1828, gave judgment in favor of the respondent, with costs, which was con-

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firmed by the court of appeals on the 30th July in the same year, from which this appeal was instituted.

*Spankie*, (Serjeant) and *Stuart*, for the appellants.— The rigging was lawfully in possession of the appellants, as part of the outfit of the ship they were building for the house of Henry and Reid at Newry. It had, for that purpose been consigned, by the respondent, the agent of the Newry house, and delivered over by Maxwell to the appellants; it was subject therefore to all the rights of lien, which had accrued to the appellants, both on account of their advances in respect of the ship, and of their payments of the duties and other charges on the rigging itself. Neither the appellants, or Maxwell, were ever the agent of the respondent.— Maxwell, indeed, after he had been dismissed from his situation by the appellants, had pretended that he was invested with that character; but his story was contradicted in many points, unsupported in any, and altogether improbable. He pretended to have had a letter of instructions, which ought to have been produced, if it existed, at the time of the trial, or if it did not exist, some evidence ought to have been given as to what had become of it: neither of these courses, however, was adopted; nor was a tittle of evidence offered to confirm his assertion, that he had acted as the agent of the respondent, or even to prove that he had ever pretended to have been so till the failure of Henry and Reid first suggested to the respondent this plan of getting possession of the articles in dispute. The fact of the appellants having, as the agents of the Newry house, paid the Custom house duties upon them, clearly proves that they were not considered to have been consigned to Maxwell, as the respondent's agent; and

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in the account which was made out upon his dismissal, although the appellants had then the rigging in their possession, he never attempted to charge them with it. Putting Maxwell's evidence out of the question, therefore,—as it must be,—the respondent's case cannot be supported. The goods, no doubt, were delivered to Maxwell unconditionally, and the case stands on the same principle as that of *Ogle v. Atkinson*, (a) where the decision was, that an unconditional delivery of goods to the captain was an unconditional delivery to the owner of the ship, and that the property, therefore, vested in him. According to these principles, therefore, the property would have vested in the Newry house, from whom Maxwell held his appointment as captain, and whose agent he was. Admitting, however, Maxwell's evidence to be true, he no where says, that he told the appellants that he was the agent of the respondent, or that he had a letter of instructions from him; the same doctrine therefore applies; and the appellants having obtained unconditional possession of the goods, the property of them vested in the Newry house, subject to the appellant's lien. The respondent had lost all right as an unpaid vendor to stop the goods *in transitu*, because by the delivery to the agents of the Newry house the *transitus* was determined, and according to the English law he had no title to institute such an action. By the law of Lower Canada, an unpaid vendor may in most cases follow his goods in the hands of the purchaser, but this is one of the cases which *Polhier* (b) mentions expressly as exceptions from the general rule, when he says, that the *posses-*

(a) 1st Marshall, 323. (b) *Traité de la Propriété*, partie 2nde cap. 1, art. 295.

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*seur de bonne foi*, if he loses possession of the articles, may bring his action of *revendication* to recover them against the proprietor himself. Uninformed as the appellants were by Maxwell of his character as agent for the respondent, they must be considered as *posseurs de bonne foi*. Even if they had lost the possession of the goods they might have recovered them, and *a fortiori*, not having parted with that possession, they were entitled to retain it.

*Pollock* (K. C.) and *Pattison*, for the respondents:—The courts below gave full credence to Maxwell's evidence, and founded their decision upon it; and your Lordships' judgment in the late case of *Santacana v. Ardevol* (a) has established the principle, that it is the exclusive province of those courts to decide whether evidence shall be believed or not, and that their decision on that head shall not be questioned before you.

[*Master of the Rolls*.—That decision never was meant to establish the doctrine that this court could not examine the evidence of the *res gestæ*.]

Even if Maxwell's evidence was put out of the case the decision must be for the respondents; the property must have been delivered to them (if there was a delivery) under the impression that it was to be employed upon a ship belonging to the house at Newry. Now at the time of that delivery there was no ship belonging to that house on which it could be employed. The appellants, in consequence, no doubt, of intelligence they had received of the approaching insolvency of the Newry house, had, by means of an assignment from the builder, and a registry in the name of some of the members of their firm, made the Ocean their

(a) Knapp's R. 269.

own. It was a gross fraud therefore for them to receive these articles for the use of a ship belonging to the Newry house, when they knew that at the time of their arrival there was no ship belonging to the Newry house in existence. It cannot even be argued, that they took out the registry of the ship in their own names, in pursuance of the directions from that house to take out a registry. The registry intended by that house was merely an interim registry, or certificate until the ship arrived in Europe, under the 6th Geo. IV. cap. 110, not an absolute registry such as the appellants had taken. The invoices of the goods were made out in the respondent's name, and this circumstance furnishes convincing evidence, independently of the testimony of Maxwell, that the property of them was his. Supposing this to be the case, he had full right, according to the English law, on hearing of the insolvency of the Newry house, to give orders to his agents to stop the goods *in transitu*, *Fiese v. Wray*. (a) The French law gave him further powers of preserving his property, for it allows the unpaid vendor to attach the goods in the hands of even a *bonâ fide* holder. The Custom of Paris states the law in these terms: "Qui vend aucune chose mobilière sans jour, et sans terme, esperant être payé promptement, il peut sa chose poursuivre en quelque lieu qu'elle soit transportée, pour être payé du prix qu'il l'a vendue;" and *Pothier's* commentary upon this article, in his *Treatise de la Propriété*, is, "Il résulte clairement de ces termes, 'il peut sa chose poursuivre,' lorsque le vendeur a vendu sans jour et sans terme, la chose vendue non obstant la tra-

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(a) 3d East, 93.

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dition qu'il en a fait, en quelque lieu qu'elle ait été transportée, en quelques mains qu'elle ait passée, demeure toujours sa chose jusqu'à ce qu'elle ait été payé." (a) Another principle of French law is, that the property of a thing does not pass by the mere delivery of it; it is also requisite, that he who delivers it should deliver it with the intention of passing the property; he who accepts it should accept it with the intention of taking the property. This is also stated by *Pothier* in the same Treatise, in these terms: "Il faut que le consentement intervienne sur la personne, à qui l'on veut transférer la propriété de la chose dont on fait la tradition, si voulant me donner une chose vous la donnez à mon homme d'affaires, comptant la lui donner pour moi, et qu'il l'ait reçue croyant la recevoir pour lui, cette tradition ne transférera la propriété de la chose ni à mon homme d'affaires, à qui vous n'avez pas voulu la donner, ni à moi, mon homme d'affaires ne l'ayant pas reçue pour moi, *si procuratori meo rem tradideris, ut meum faceres, is hâc mente acceperit, ut suam faceret, nihil agetur.*" (b) Here the appellants received the articles with the intention of applying them to the use of their own ship; they were delivered to them for the purpose of being used in the building of the ship of Henry and Reid. The property in them, would not therefore, pass to the appellants, because there was not that consent or mutual understanding between the parties which the French law requires. In the passage cited on the other side from *Pothier*, where he says, that if the agent sells contrary to the orders of the owner, the purchaser may revendicate the proper-

(a) *Pothier's Traité de la Propriété, partie première, cap. 2, art. 242*

(b) *Ib. art. 233.*

ty from the owner, it is evidently pre-supposed that the purchaser shall have paid the purchase money.— Now here the appellants have never paid any thing. According to our own law, it is clear that goods which have been delivered by mistake can be recovered, *Litt v. Cowley* (a) and no person can obtain a lien by a wrongful act, *Griffiths v. Hyde*. (b) The action of *revendication* is indeed in principle like our action of *trover*, which has been termed an equitable action by Lord Mansfield, in *Fitzroy v. Gwillim*, (c) and nothing can be more inequitable than that a man should be allowed to retain goods, for which he has never paid, and which never would have come into his possession except either by fraud, or misrepresentation on his part, or misconception or mistake on the part of the agent from whom he obtained them.

*Spankie*, in reply. The appellants were clearly the agents of the Newry House, and the delivery of the goods was made to them in that character ; even if it had not been so, the respondent had lost his property in them by the delivery to Maxwell, who was also the agent of the Newry House.—The sections that have been cited from *Pothier* do not bear upon the question ; in the first quoted, the delivery proceeded on a mistake ; the parties were not agreed, and therefore there was no contract ; the second quotation only says, that when no time for payment is stipulated the present time is understood ; and thus when goods have been delivered on the understanding, that they are to be paid for by ready money, and no payment is made, the property of them remains in the vendor,

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(a) 7th Taunton, 169.  
 (c) 1st. T. R. 153.

(b) Selwyn's Ni. Pri. MSS. 1388.



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and he may recover them. The reason for such a rule is plainly, because it is a fraud upon the vendor if the purchaser retains them without paying for them according to his agreement. Here, however, the goods had been delivered to the persons for whom they had been intended ; and the reason why no contract was entered into with them for the payment was because the contract for that purpose had of course been entered into with the Newry House, and they were responsible for the payment. The case of *Trewhella v. Rowe* (a) was very similar to the present.—There the owner of a ship had ordered stores of the plaintiff ; he then sold the ship to the defendant. The plaintiff delivered the stores on board the ship after its sale to the defendant, in pursuance of the orders he had received from its former owner previously to its sale, and afterwards sued the defendant for the payment. The court of King's Bench unanimously held that the plaintiff had no claim against the defendant, because it was evident he must have furnished the goods on the credit of the former owner, and not of the defendant. Here it was clear that the respondent had furnished the goods to the ship on the credit of the Newry House, and on that account, in accordance with the principles established by the case of *Trewhella v. Rowe* the respondents had no claim against the appellants.

*Master of the Rolls.* In this case their lordships are of opinion, upon the balance of evidence, that there was an actual delivery to Rogerson, Hunter & Co. of Quebec, and consequently that the property

(a) 11th East, 438.

did not belong to Isaac Corrie Reid. Their lordships are not satisfied that Rogerson, Hunter & Co. had any fraudulent intention towards the Newry House in this transaction.—The register taken out by them might have been a reasonable measure of security to prevent the ship being seized by the creditors of the Newry House, which it appears they at that time suspected of embarrassment in its circumstances. The Quebec House did not cause the register to be taken in the names of the partners resident at Quebec, but in the name of a partner who resides at Greenock. Greenock is in the immediate neighbourhood of Newry, and the register might therefore have been taken in that name, with the view of affording facilities for an equitable arrangement with the House at Newry. Their lordships are further of opinion, that even if there was a question, whether or not there had been a delivery to the Quebec House, the delivery to Captain Maxwell would have been a delivery to the Newry House of which Captain Maxwell was agent, so as to vest it in the Newry House. Two sections have been cited to us from the works of Pothier as to the French law that prevails in Quebec. In the first of these sections it is said, “If goods be delivered to my attorney for the purpose of being delivered to me, and he receives them not as for me, but as his own property, the goods do not in law pass to him.”—Now it is perfectly clear, from the Latin quotation, that the meaning of that section is, that if he by mistake receives them, considering them to be delivered to him personally, and not to him as agent for me, it necessarily follows that a delivery by mistake passes no property.—The Latin quo-

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tation is, "Si procuratori meo rem tradideris, ut meam faceres, is hâc mente acceperit, ut suam faceret, nihil agetur." (a) If he receives it as his own, believing it is intended for him, when in truth it is not intended for him, but for me, who am his principal, then no property passes, it is a mere delivery by mistake. The other section of the French law, which has been cited, is this ; Qui vend aucune chose mobilière sans jour, et sans terme, esperant être payé promptement, il peut sa chose poursuivre en quelque lieu qu'elle soit transportée pour être payé du prix qu'il la vendue." That is, that he, who has sold a thing without naming the day of payment, or fixing the time of payment, is to be understood as selling for ready money ; and if a contract be made for ready money, and the purchaser possesses himself of goods under that contract, he does not obtain the property in those goods, till he has made the payment according to that contract. This has no application to this case. Upon the whole, therefore, their lordships are of opinion that the judgment below must be reversed.

Judgment reversed.\*

(a) Pand. 41. tit. 1. §. 37. § 6.

\* The decision of this case was postponed on the first day's hearing, in order that their lordships might obtain the assistance of Lord Tenterden, who was present at the second day's argument and the judgment.

This case is reported in *Knapp's* reports of cases before the Privy council, p. 362.

**KEYS against THE QUEBEC FIRE ASSURANCE COMPANY.**

**T**HIS action was instituted for the purpose of trying the validity of a bye-law passed by a board of directors of the Quebec Fire Assurance Company on the 23d day of February 1830, directing "that after the 31st day of March, then next, the discount to be allowed to stockholders upon the amount of premiums to be paid to the company, should be  $33\frac{1}{2}$  per cent, and that all stockholders should be entitled to such discount, to the annual amount of £500, for each share." The plaintiff was a stockholder, and demanded from the company an account of the profits to which, as proprietor of ten shares therein, he was entitled, according to the articles of association. Not having effected any insurance with the company, this bye-law deprived him of a third of his share of the profits arising from such insurances as were effected by other stockholders, and divided the tariff of premiums established by the articles of association, into two different rates, one applicable to stockholders effecting insurances with the company, and the other to individuals, not stockholders, also effecting insurances.— Upon a demurrer it was urged, that the action had been improperly brought, in making the illegality of the bye-law a specific ground of action, whereas the bye-laws of any corporation were not within the jurisdiction of a court of law. (a)

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A stockholder in a joint stock company can bring an action of account against the corporation, and thereby contest the validity of a bye-law made by a board of its directors.

(a) Cases cited at the hearing in support of this action: *The King v. Whitstable company of Free Fishers*, 7 East, 353. *Adley v. The Whitstable company*, 17 Vesey, 315. Lord Chancellor's decision in the same case, 1 Merivale, 107. *Adley v. Reeves*.—2 Maule v. Selw, 53.

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SEWELL, CH. J. This case is an important one, not only to the parties concerned, but to all the partners in every joint stock company. It has been argued upon the demurrer that no action can be brought specially by one partner of a joint stock company against the company as a corporation, in the same manner as the partner of a mercantile firm could not maintain an action against another partner for any claim arising out of the partnership. But here there was no demand of money, no claim of debt, there was nothing but the demand of an account; and the declaration was a mere narration as to the grounds on which the plaintiff considered the bye-law, or resolution of the directors, which he complained prejudiced him, as insufficient and contradictory to the articles of association of the company. It was an account, and nothing but an account that was asked for. The Counsel for the company has admitted that an account existed in conformity with the resolution in question, which it was denied the plaintiff could legally object to in a court of law, but if he could not bring it before this court he would be remediless in case that account was incorrect or unjust. In the case of *Adley v. The Whitstable Fishery and Dredging Company*, in which the validity of a bye-law was called in question, it was laid down by Lord *Eldon*, that a partner of a joint stock company has a right to bring an action against the corporation of which he is a member, for "if the consequence of such management,—in forming bye-laws,—is that a court of law cannot enter into the validity of a bye-law, the question is whether this court will not hold jurisdiction for the purpose of sending that question to a court of law, otherwise the most unreasonable thing

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might be done without a remedy in any court." The mode of trying the question of the validity of a bye-law, appears to be by an action. Here if such an action in common law can be maintained, it appears that this action may, and the general allegations of the defendants are met by this case. There is a special allegation, however, that the declaration does not state any refusal to grant the account desired; but this is in fact an application to set aside the bye-law of the directors, there is no conclusion, no prayer for judgment of a debt claimed, so there need not be any statement of a refusal to grant an account. But it is shewn on the face of the declaration that the account required would never have been obtained had it been asked, it being considered that the plaintiff was not entitled to any portion of those profits which were given up to certain stockholders in consequence of the resolution in question. The declaration thus accounts for there being no demand of account made, nor any refusal to grant it.

Demurrer over-ruled.

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### ON APPEAL FROM QUEBEC.

LOUIS FOURNIER.....*Appellant.*

and

JAMES OLIVA.....*Respondent.*

**T**HIS was an action by the appellant, plaintiff in the Court of King's Bench, against the respondent, *en*

proprietor subject to a servitude, in favor of the public, for public utility.

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The banks of  
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*complainte*, for having trespassed on the plaintiff's land, and erected a fence on the front thereof adjoining the river Vase, to the damage of the plaintiff of ten pounds, with the usual conclusion. The respondent pleaded the general issue. It appeared that, to a certain extent, the river bounding the front of the appellant's land, was a navigable river, and that in the place where the fence was erected, the ordinary tides came nearly to the bottom of the pickets, but that the highest tides rose nearly to the top of the pickets: that the appellant and his predecessors had, for 30 years and upwards, been in the possession of the land where this fence was erected, and had usually cut hay upon it. The Court of King's Bench dismissed the action, considering the place where the fence was erected to be public property, in which the appellant could have no possession to entitle him to maintain his action.

REID, CH. J. The action was well brought in the court below, and the plaintiff was entitled to judgment. The banks of navigable rivers belong to the persons whose lands adjoin those rivers, subject, however, to the restriction in favor of all His Majesty's subjects of free communication with the river for all purposes of public utility. By the Roman law the banks of navigable rivers belonged to the proprietors of the lands adjoining such rivers; and previous to the ordinance of 1669, no statutory law in France, to the contrary, could be found. It has been maintained by some writers,—treating of the construction to be given to this ordinance,—that as a road of twenty-four feet was thereby reserved along the banks of navigable rivers for public purposes, the bank of the river was to this extent, to be considered as vested in the Crown.

and as public property. But this opinion has been controverted by so many other writers of greater weight, and upon such strong grounds, that the court cannot hesitate in rejecting it, and therefore reverses the judgment of the court below, and enters judgment for the appellant.

*Duval* for the appellant.—*C. Panet*, for the respondent.

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ON APPEAL FROM QUEBEC.

ANDREW PATERSON AND OTHERS.....*Appellants.*

and

DUNCAN MCCALLUM AND OTHERS....*Respondents.*

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**T**HE appellants and others had obtained writs of execution against John McCallum, by which they seized and sold several lots of land belonging to him in the Township of Tring, which were held in free and common soccage. But claims were made by the respondents upon the lands in question, founded on a notarial obligation of the late James McCallum of the 27th of November 1816, and these were admitted by the court below for the balance and interest of that obligation, in the order of distribution and collocation of the monies so levied, on the ground of the tacit but general *hypothèque* or mortgage, which was included in that, as in every *acte authentique*. It was against this decision that this appeal was brought.

A general mortgage or *hypothèque* does not affect lands held in free and common soccage.



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The grounds upon which the judgment of the court of King's Bench was impugned were the following :—  
By the proclamation of 1763, published immediately after the cession of Canada to Great Britain, by France, it was among other things published and declared, “ That we have, in the Letters Patent under  
“ our Great Seal of Great Britain, by which the said  
“ governments are constituted, given express power  
“ and direction to our governors of our said colonies,  
“ respectively, that so soon as the state and circum-  
“ stances of the said colonies will admit thereof they  
“ shall, with the advice and consent of the members  
“ of our council, summon and call general assemblies  
“ within the said governments, respectively, in such  
“ manner and form as is used and directed in those  
“ colonies and provinces in America which are under  
“ our immediate government ; and we have also given  
“ power to the said governors, with the consent of  
“ our said councils, and the representatives of the  
“ people, so to be summoned as aforesaid, to make,  
“ constitute and ordain laws, statutes and ordinances  
“ for the public peace, welfare, and good government  
“ of our said colonies, and of the people and inhabi-  
“ tants thereof, as near as may be agreeable to the laws  
“ of England, and under such regulations and restric-  
“ tions as are used in other colonies ; and in the mean-  
“ time, and until such assemblies can be called as afore-  
“ said, all persons inhabiting and resorting to our said  
“ colonies may confide in our royal protection for the  
“ enjoyment of the benefit of the laws of our realm of  
“ England ; for which purpose we have given power,  
“ under our Great Seal, to the governors of our said  
“ colonies, respectively, to erect and constitute, with

“ the advice of our said councils, respectively, courts  
 “ of judicature and public justice, within our said  
 “ colonies, for the hearing and determining all causes,  
 “ as well criminal as civil, according to law and equity,  
 “ and, as near as may be, agreeable to the laws of  
 “ England, with liberty to all persons, who may  
 “ think themselves aggrieved by the sentence of such  
 “ courts, in all civil cases, to appeal, under the usual  
 “ limitations and restrictions to us in our privy coun-  
 “ cil.” Courts of justice were erected under this pro-  
 clamations by which justice was administered within  
 the colony according to the law of England. But as  
 doubts had arisen respecting the power of the crown  
 to legislate over conquered countries by proclama-  
 tion, (a) the Quebec act (14th, Geo. III. c. 83.) was  
 passed to regulate, by the acknowledged paramount  
 authority of the Imperial Parliament, the laws whereby  
 the Canadas, then the province of Quebec, would in  
 future be governed. The eighth section of this act  
 provides, “ That in all matters of controversy relative  
 “ to property and civil rights, resort shall be had to  
 “ the laws of Canada as the rule for the decision of  
 “ the same,” but in the section immediately following  
 it is enacted, “ That nothing in this act shall extend  
 “ or be construed to extend to any lands that have  
 “ been granted by His Majesty, or shall be hereafter  
 “ granted by His Majesty, his heirs and successors,  
 “ to be holden in free and common soccage.” Diver-  
 sities of opinion having arisen and long subsisted res-  
 pecting the true construction to be given to these  
 enactments they were set at rest by a declaratory act

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(a) Vide *Hall v. Campbell*. Cowp. R. 204, and the Report of Mr.  
 Attorney General *Maseres* in 1767, in the Quebec Commissions.

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of the Imperial Parliament, passed in the sixth year of his present Majesty. The clause relating to this subject being, "Whereas doubts have arisen, whether  
"lands granted in the said province of Lower Canada, by His Majesty or by any of his royal predecessors to be holden in free and common soccage, shall be held by the owners thereof, or will subsequently pass to persons according to the rules of descent and alienation in force in England, or according to such rules as were established by the ancient laws of the said province, for the descent and alienation of lands therein, be it, therefore, declared and enacted, that all lands within the said province of Lower Canada, which have heretofore been granted by His Majesty or by any of his royal predecessors, to any person or persons, their heirs and assigns, to be holden in free and common soccage, or which shall or may hereafter be so granted by his Majesty, his heirs and successors, to any person or persons, their heirs and assigns, to be holden in free and common soccage, may and shall be by such grantees, their heirs and assigns, held, granted, bargained, sold, aliened, conveyed and disposed of, and may and shall pass by descent in such manner and form, and upon and under such rules and restrictions, as are by the law of England established and in force in reference to the grant, bargain, sale, alienation, conveyance, disposal, descent of lands holden by the like tenure therein situate, or to the dower or other rights of married women in such lands, and not otherwise, any law, custom, or usage to the contrary in any wise notwithstanding : provided, nevertheless, that nothing

“ herein contained, shall extend to prevent His Ma-  
 “ jesty, with the advice and consent of the legislative  
 “ council and assembly of the province of Lower  
 “ Canada from making and enacting any such laws or  
 “ statutes as may be necessary for the better adapting  
 “ the before mentioned laws of England, or any of  
 “ them, to the local circumstances and condition of  
 “ the said province of Lower Canada and the inhabi-  
 “ tants thereof.” (a) There thus ceasing to remain  
 any ground of controversy as to the extent which the  
 legislature intended the English law should obtain  
 in respect to free and common soccage lands in Lower  
 Canada ; it remains only to enquire whether the hypo-  
 thec or mortgage was comprized within the limits  
 declared by the last mentioned statute, and for this  
 purpose to ascertain whether it is to be considered in  
 law as an alienation or not. The import of the term  
 alienation as here used must, it is apprehended, be  
 sought for in that law in relation to which it is used, that  
 is, the English law. By that law nothing can be more  
 clear than that a mortgage is an alienation. (b) In the  
 civil law an hypothec was in like manner considered  
 an alienation. (c) So also it is considered as an alien-  
 ation in the French law. (d) It was further urged that,  
 beyond all controversy, the English law, relative to  
 mortgages, obtained, and if it obtained at all it must  
 have obtained exclusively, for it would be a contra-  
 diction in terms to hold that two sets of rules differ-

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(a) 6 Geo. IV. c. 59. § 8.

(b) 1 Powell on Mortgages, 4, 23, 77, 138, 140. Cruise *sub hoc titulo*.  
 Bac. Abr. tit. mortgage. Com Dig.

(c) Calvini Lexicon Jur. verbis,—Alienare, Alienatio, Alienandi et Ali-  
 enationis.—Code lib. 4, tit. 5. l. ult. Perezzius de rebus alienis non alienandis,  
 &c. § 5.

(d) L. C. Den. v. Alienation § 5. Ricard. Substitutions, No. 369.

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ing essentially from each other, but of equal authority, should apply to, and regulate the same subject. The word *disposed*, used in the statute, is of more comprehensive import even than the word *alienate*.

REID, CH. J. The question to be now decided is one upon which various opinions have been entertained. It is whether an *acte authentique*, and general mortgage of all present and future property, can affect lands in free and common soccage. The court are convinced that, under the laws of this country, when properly explained, lands held in free and common soccage, cannot be so affected. The statute of 1774, (the Quebec act,) directs, as a general principle, that "in all matters of controversy relative to property and civil rights, recourse shall be had to the laws of Canada, as the rule for the decision of the same;" but by the next section it is provided, "that nothing in this act shall extend, or be construed to extend, to any lands that have been granted, or shall hereafter be granted by His Majesty in free and common soccage." It is true the parliament of Great Britain did not thereby in terms determine by what rule the civil law should be administered with respect to such lands, but it follows, that this exception being made as to lands held in free and common soccage, that is by the tenure by which lands are almost universally held in England, the legislature could alone mean that the same law as governs lands in free and common soccage in England, should govern lands similarly situated here. Doubts and difficulties have, however, constantly arisen, and for a long time existed, a variety of opinions have been formed thereon, and the laws of Canada, having, notwithstanding, been construed to extend to such lands, con-

siderations of the injurious consequences that would arise to estates and families, if the subject were to remain longer involved in those doubts and difficulties, caused the Act of the imperial parliament of the 6th Geo. IV. to be passed, after which, if any doubts existed, they must be removed, for by that declaratory statute, lands in free and common soccage in Canada, are declared to be subject to the same laws, modes of succession, conveyance and alienation, as lands in free and common soccage in England. Now, how can it be said that a paper drawn up before a notary, not specifying any particular lands, can have any reference to what is understood by a mortgage in the laws of England. A mortgage there, is not what a notarial act is here, a

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Until the passing of the Quebec act no certain guaranty was given to the old or new subjects, as to the laws by which the Canadas were, in future, to be regulated. There can be no doubt that the object of the campaign, and the negotiation which terminated in the treaty of cession of 1763, was to introduce into these provinces the English laws, and the English manner of government, and thereby to assimilate and associate this province to the other British colonies in North America; and not to keep it distinct and separate from these in laws and manners, to all future generations. If the latter system had been that which the British government had adopted, orders would have been given to Sir Jeffery Amherst to keep up, from the first moment, all the courts of justice that were at that time in being in the colony, and even the several officers that composed them, upon the same footing on which they then subsisted. Instead of this, Sir Jeffery Amherst immediately suppressed all the former jurisdictions and erected military councils in their stead, and in the articles of capitulation refused to promise the inhabitants of this province *the continuance of the Coutume de Paris, and the other ancient laws and usages*, by which they had been governed, although in that behalf requested by the French general. In the treaty of 1763, nothing is said respecting the ancient laws and usages of the country; the sole guaranty which it contains is the free exercise of the catholic religion.

The proclamation of the 7th of October 1763, encouraged British and other ancient subjects, to settle in this and the other newly erected governments, and promised them, as an inducement thereunto, the immediate enjoyment of the benefit of the laws of England. The commission of vice admiral of this province, granted to general Murray, expressly introduces all the laws of the English courts of admiralty into this province. And the commission of the same person to be captain general and governor in chief of this province, directed him to summon an assembly of free holders and planters, and in conjunction with these *to make laws and ordinances not repugnant to the laws of England*.

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mere acknowledgment of a debt, but is a conveyance of the land. A mortgage is a contract of sale of certain land for a certain sum, with a power to redeem. It is a special pledge or security given to a special creditor, for a special sum of money, and is a conveyance, provisional as to its redemption, which must have all the qualities of an absolute sale, excepting as regards the proviso of redemption. The judgment of the court below is, therefore, reversed with costs, and the parties sent back to obtain a fresh distribution of the proceeds of the sale, the property having been sold at the instance of two or three individuals.

Judgment reversed.*

Much controversy existed in the colony between the issuing of the proclamation and the passing of the Quebec act, upon this head; and the Quebec act seems to have been intended as a final and definitive adjustment of the matter, having a due regard to the interests and claims of both classes of His Majesty's subjects, and securing to the inhabitants of the seigniories "the system of laws by which their persons and property had been protected, governed and ordered for a long series of years, from the first establishment of the province of Canada," and at the same time redeeming the pledge contained in the proclamation of 1763, as near as was consistent with the just claims of the inhabitants of the seigniories. No grants in free and common socage of any consequence, appear to have been made until about the year 1797, and all these grants were made "to the grantees, and each of them severally and respectively, in free and common socage, by fealty only, in like manner as lands are holden in free and common socage in that part of Great Britain called England." Almost immediately after these grants the subject in controversy, in the above case, came to be agitated within the colony, and in its importance was more and more felt, when the whole process of township land granting was completed about the years 1803-1804. In this year a reference was made to the judges in Canada, by order of the government in England, upon the subject, and their opinions taken, transmitted to England and referred to the attorney and solicitor general of that day. There is every reason to believe that the declaratory act of 6th Geo. IV. is not only in accordance with, but absolutely framed upon these opinions.

* Vide Prov. Stat. 9 and 10, Geo. IV. cap. 77.

ON APPEAL FROM QUEBEC.

GEORGE MONTGOMERY.....*Appellant.*
 and
 SAMUEL GERRARD AND OTHERS,
Executors, &c.....Respondents.

17th Novr.
 1830.

AN action of debt was instituted by the appellant as executor of the last will and testament of the late Matthew McClure, against Francis and William Hunter, as co-partners, on their notarial obligation dated 1st June 1811. In consequence of an execution sued out on a judgment rendered against the defendants, several lots of land, the property of the said co-partnership, were seized and sold. An opposition was filed by the respondents, executors of the late David David, claiming the monies levied, founded on a notarial obligation executed by Francis Hunter, one of the defendants individually, on the 7th November 1794, which had been assigned to the said David David. It was considered by the court below, that there being a priority of mortgage in favor of David, it would attach upon the property of the partnership which had been seized and sold under the execution, and thereupon the monies levied were adjudged to the respondents.

Partnership
 property is not
 liable for the
 debts of any
 of the partners
 individually.

The reasons assigned by the appellant upon this appeal were, 1. That by the law of this country, the creditors of a company have exclusively set apart to them the partnership estate for payment of their debts, against the company. The particular creditors of the firm

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have no claim upon the property of the partnership, except when there is a surplus after the payment of all the partnership creditors; and then the creditors of each of the particular partners have a right to be ranked on the portion of their debtor in that surplus: whereas in this case the particular creditor was allowed to be ranked upon the proceeds of the joint estate, to the exclusion and prejudice of the creditors of the joint fund. 2. That a creditor cannot by law have any other or greater interest in the property of his debtor, than the debtor himself had, and that the right of Francis Hunter in the property seized in this cause, was one subject to the payment of the joint debts under the rule, *bona intelliguntur cujusque, quæ deducto ære alieno supersunt*. And that by the judgment complained of, there was given to the respondents a greater interest in the subject seized than was possessed by the debtor. (a)

(a) See an arrêt of the parliament of Grenoble of the 22d of August 1637, in Basset, vol. 2. B. 5. T. 2. cap. 11. Arrêt of the 11th June 1692, in Brillou, Dict. des Arrêts p. 208. Société-Dettes § 7. Arrêt of 25th January 1677, in Jour. du Palais, T. 1. p. 776, and in Jour. des Aud. T. 3. l. 4. cap. 3, p. 178. Despeisse de la Société, sect. 4. dist. 2. § 3. Bacquet Tr. des Droits de Justice, cap. 21, § 136. Dig. 17. 2. 27. Questions sur les privilèges et Hypothèques, par Persil, Tom. 1. p. 192. § 111. No. 60.—Code Napoleon, No. 1860. Gow's Law of Partnership, p. 48, where the cases in the English law are collected, and Bell's Commentaries containing a summary of the Scotch law, pp. 29, 555, 556, 558.

The doctrine in the modern French law is beautifully stated in the following extracts from Pardessus. *Cours de Droit Commercial*.

*** Une société est une personne morale, qui, dans un grand nombre de circonstances, peut, par toutes sortes de contrats ou quasi-contrats, s'engager ou engager à son égard. **

Le créancier particulier d'un associé ne pourrait faire saisir les effets et autres choses formant l'actif de la société, sous prétexte qu'une partie indivise en appartient à son débiteur. Il doit attendre la liquidation, se borner aux oppositions susceptibles de conserver ses droits, et exercer ceux de son débiteur, dans le partage des profits, aux époques déterminées par les conventions. Il ne pourrait même pas, sous le prétexte que les droits de son débiteur sont exposés par des spéculations chanceuses, s'y opposer, lorsqu'elles ont été résolues par la société, ni intervenir dans ses délibérations.—Vol. 4, pp. 17, 18.—No. 975.

Per curiam.—Partnership property is not liable to the payment of the debts of individual partners,—nor can a partner have any separate disposable interest in the partnership property over which his creditors could exercise any control until it has been first ascertained what is the separate interest of that partner in the partnership concern, after the debts are paid. The judgment of the court of King's Bench is therefore reversed, and the monies levied, ordered to be paid over to the appellant.

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Mais si la société était formée par actions, comme alors elle a, ainsi que nous l'avons vu n. 973, un caractère plutôt réel que personnel, qu'elle est une réunion de capitaux plutôt que de personnes, le créancier pourrait provoquer la vente de ces actions, à moins que l'acte social rendu public dans les formes légales ne les eût déclaré incessibles. De même, celui qui serait créancier d'un des associés, et débiteur de la société, ne pourrait, ni invoquer, dans son intérêt, la compensation, pour se libérer, ni être repoussé dans les poursuites qu'il exercerait contre son débiteur, par l'exception de compensation que ferait valoir celui-ci, du chef de la société.—Ib. p. 19.

Toutes les dettes qui ont été contractées par la société doivent être acquittées avec les effets qui en composent l'actif, à l'exclusion des créanciers particuliers des associés, puisque la société était un être moral, qui avait son individualité et ses droits distincts de ceux de chacun de ses membres. La raison s'en fait sentir facilement. Les créanciers particuliers d'un associé ne peuvent prétendre plus de droits qu'il n'en aurait lui-même; or, il ne peut en exercer que dans ce qui restera quand les dettes seront payées. Mais lorsque l'actif de la société étant insuffisant, les créanciers exercent leurs droits sur les biens personnels des associés, ils ne viennent qu'en concurrence avec les créanciers particuliers. On rentre alors dans le droit commun, l'exception que nous venons d'indiquer ne pouvant plus avoir son effet.

Les droits des créanciers contre les associés individuellement, sont plus ou moins étendus, suivant les règles que nous avons données; ils subsistent après la mort de chaque associé, contre ses héritiers; et lorsque la société ne continue pas avec eux, la dette totale se divise entre ceux-ci, conformément aux principes du droit civil. Par exemple, deux personnes sont en société. Il est dû à un tiers 20,000 francs. Le créancier peut demander les 20,000 francs en entier à celui des associés qu'il veut choisir, tant qu'ils sont vivans. Si l'un d'eux vient à mourir avant que l'obligation ait été acquittée, sa succession peut bien être, en vertu de la solidarité, contrainvée pour payer la totalité des 20,000 francs; mais s'il a laissé plusieurs héritiers, chacun d'eux ne doit personnellement, dans ces 20,000 francs, qu'une part virile. c'est-à-dire un quart, un cinquième, selon qu'ils sont quatre ou cinq héritiers. Ib. p. 211. No. 1069.

ON APPEAL FROM QUEBEC.

AUGUSTIN ROUTIER.....*Appellant.*

and

THERESE ROBITAILLE.....*Respondent.*17th Novr.
1830.

A notary public cannot be compelled, upon an inscription *en faux*, to give evidence touching the validity of any instrument executed before him.

THIS was an action instituted by the respondent in the Court of King's Bench at Quebec, against the appellants *en délivrance de legs*, under the last will and testament of the late François Bonneville, the husband of the respondent. The appellants fyled an inscription *en faux* against the will, as not having been made and executed in the manner prescribed by law for a *testament solennel*, and in the manner certified by the notary in whose possession the minute was deposited. In support of the *moyens de faux*, several witnesses were examined by the appellants, and amongst others the two notaries before whom the will was made. The respondents as well as the notaries themselves objected to their being examined touching the validity of the *acte*, which they had executed as public officers, but the objection was overruled, and they were examined. The court below, however, considered that the will had been regularly made, and rejected the inscription *en faux*.

Per curiam. The judgment of the Court of King's Bench must be confirmed, but, according to the decisions under the law of the country, the notaries could not be examined as witnesses, and as public officers they could not by law be compelled to give evidence

to controvert the truth of what they had certified as such, touching the execution of any act passed before them.

Caron, for the appellant.—*Taschereau* and *Taschereau*, for the respondent.

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Judgment affirmed.

ON APPEAL FROM MONTREAL.

WILLIAM MAITLAND AND OTHERS.....*Appellants*.
and

JOHN MOLSON AND OTHERS.....*Respondents*.

NEAR the port of Sorel or William Henry considerable damage was occasioned to the *New Swiftsure*, a steamboat belonging to the respondents, by her coming into collision with the *Hercules*, a steamboat belonging to the appellants. An action was brought in the court of King's Bench at Montreal by the respondents for damages, occasioned by their collision, on the 23rd June 1826, owing, as alleged, to the negligence, carelessness and unskilfulness of the servants of the appellants in directing and managing the *Hercules*, by means whereof the *New Swiftsure* was much damaged, and divers goods, wares, and merchandize

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In a cause of collision by one steam vessel against another where the loss was charged to be owing to negligence of the defendants, the court being of opinion that the damage was occasioned by such negligence pronounced for damages and costs.

Quære whether under

certain circumstances one moiety of the aggregate amount of the damage should not be borne by each party.

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then shipped on board of her were damaged and the respondents compelled to lay out a large sum of money in repairing their steamboat, and whereby they were deprived of the use of their vessel during twelve weeks, &c. to the damage of the respondents, &c. The appellants pleaded the general issue. The judgment of the court below awarded a certain amount of damages to the respondents being the amount charged for repairs, the loss of profit on the trips of the *New Swiftsure* during the time she was laid up, and a portion of the sum claimed for furniture, &c. damaged and destroyed by the collision. From this judgment the appellants instituted this appeal on the ground that, at the trial, negligence and unskilfulness on the part of the persons managing the *Hercules* had not been shewn so as to entitle the respondents to a judgment in their favor. The respondents also appealed on the ground that the damages awarded were insufficient to cover the loss and damage that had been occasioned. By the evidence adduced it appeared that the *New Swiftsure* entered the port of *William Henry* on the eastern or left side, and the *Hercules* on going out came down upon her in an oblique direction from the mid-channel towards the same side. That there was room for three or more steamboats to have passed abreast. That the *New Swiftsure* had the usual lights at her bow and stern and fired her usual signal gun, that her captain and passengers did not perceive any light in the bow of the *Hercules*, nor did several persons who were standing on the shore at *William Henry*. On the other hand, it was proved by persons on board of the *Hercules*, her passengers and crew, and by a sailor who hung out the lantern, that

there was a light on the larboard or left bow of the *Hercules*, being where it was always placed, that the signal gun was fired, that the lantern in her bow was broken by the collision ; its being placed on the left side was accounted for because, as was alleged, it was a constant rule for steamboats on the St. Lawrence to pass each other on the right or starboard side. The testimony was conflicting, but it however appeared that the general course for steamboats in entering and going out of the port of Sorel was to go in by the eastern bank and return by the western, until after some accidents one of the steamboat proprietors established a rule for all steamboats on the St. Lawrence to pass to the right of each other. And the master of the *Hercules* with pilots and others testified that such had been the rule since 1821, in going in and out of the *Richelieu*. Again, other pilots and other persons testified that they always went in on the eastern side and out on the western side. The master of the *Swiftsure*, particularly, testified to this fact.

SEWELL, CH. J. This case is of considerable importance considered either with reference to the intent of the parties or to the necessity of establishing a principle of law, as to collision between steam vessels, an entire novelty in jurisprudence. Ships are impelled by outward agents, by winds and by waves, and the same principles of decision are not applicable altogether to vessels whose means of propulsion are within themselves. Ships cannot always avoid coming in contact ; steamboats can, and the ancient jurisprudence cannot be properly applied to both cases. The facts of the case are that two steamboats met each other while one was leaving and the other enter-

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ing the port of William Henry. By the French law, which is our guide, the damages sustained by the *abordage* of ships,—if owing to imprudence, neglect or unskilfulness, it was evident, either one or the other must be charged with it, but when difficult or impossible to ascertain which was in fault,—the rule to be followed was to apportion the damage between them. If this rule held good as to ships, it ought *a fortiori* to be followed as to steamboats, as they contained within themselves their own power of propulsion. It has been attempted to shew negligence on the part of the *Hercules*, and that she had no lantern in the bow where it was customary to place a light: the witnesses on board the *New Swiftsure* saw none, two witnesses, on the shore, swore that neither did they see the light, this was but negative testimony, whilst two who were on board the *Hercules* say positively there was a light, that they did see it; and after the shock saw the broken parts of the lantern, this was positive not negative evidence. It has been attempted to prove also that an understanding existed between the boats as to the particular course they should pursue in entering and leaving the port of William Henry; on the other hand it appeared, that in consequence of previous accidents, Molson had given directions to his steamboats always to take the right. There did not appear to be any distinction made as to any port or river, but the directions were general. The appellants had a knowledge of this, and Brush, the master of the *Hercules*, doubtful of the course he ought to pursue, whether as by former custom he ought to keep to the left, or now, in consequence of the general directions of Molson, keep to the right, applied to the pilot for his

opinion, and, it must be remarked that, coming out of port the vessel was, more particularly, in charge of the pilot, to this the pilot made answer he would take the right, as he was then bound to do, *comme je dois faire*. On the other hand the New Swiftsure adhered to the custom previously established, and attempted also to take the right. It could not here be said that any bad intent attached to either side, and counsel had admitted it was accidental, and disclaimed imputing wilful motives or culpable negligence to the Hercules. It appeared, therefore, that each party was in the act of prosecuting what he thought right, and it could not be said that there was a greater degree of imprudence or negligence on one part than on the other. These facts leave an impression on my mind that the collision was purely accidental, and I now proceed to refer to those laws which, I think, bear upon the case. In the *Code Marine*, of 1681, liv. 3. tit. 7. there are two articles on this particular subject. In the 10th it is said, “ En cas d’abordage de vaisseaux, le dommage sera payé également par les navires, qui l’auront fait et souffert, soit en route, en rade, ou au port.” And by the 11th, “ Si toutefois l’abordage avoit été fait par la faute de l’un des maîtres, le dommage sera réparé par celui qui l’aura causé.” Thus, by the first, collision was considered, *prima facie*, as an accident; whilst the second shews that it shall be permitted by the captain on either side to prove that it was occasioned by the imprudence or negligence of the other. This law, is not, however, cited as the law of this country, for it was, as such, superseded at the conquest when the rules of the Vice Admiralty Court of England were substituted.

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The *code marine* was but a declaratory statute as to what should be considered the principles of the Roman law previously existing; though, it differed from that in this respect, that in case of pure accident the damage was borne, without remedy, by the suffering vessel. By the Roman law, if it were an accident, each party had to bear his own damage, by the *code marine* a moiety of the entire damage aggregated into one mass which was to be borne by each vessel without regard to the size of either. Under the ancient law of this country no doubt can exist that the damages in this case would have formed an aggregate, one half to be borne by the proprietors of the *Hercules* and the other half by the proprietors of the *New Swiftsure*. I am strongly struck with the propriety and equity of this, and still more with the great advantage which it would, evidently, be to the public if this principle were fully adopted. It would be productive of the utmost care and attention on the part of managers of steamboats, who, if they were conscious they would have to pay a moiety of the entire damage would compel every man on board to act most vigilantly and carefully. This is the more evident when the self propelling power which steamboats possess is considered, compared with the liability of ships to be influenced by outward agents. Such a principle would produce a saving of thousands of pounds to individuals, and would greatly augment the confidence of every person who had to risk his life and property on board of steamboats. Long experience in France had shewn that it is a right principle, and in the new "*code de commerce*" we find, "if it is doubtful to determine by whose fault the damage occurred it shall

be repaired *d'frais communs*, and *experts* appointed to determine the amount, (art. 407.) whilst, if the collision be purely accidental the damage must be borne without remedy by the vessel that sustained it; and if by the fault of one of the captains then by the one who occasioned it. In the present case there appears no possibility of discovering the author of the accident; and for my own part I am of opinion that the damages incurred should be referred to *experts* to estimate, and that one half should be borne by each party.

SMITH, *Executive Councillor*, coincided in opinion with the Chief Justice, but KERR, *Justice*, and the majority of the court being of a different opinion, the judgment of the court below was affirmed and the appeal of the respondents dismissed.

The *Solicitor General* took occasion to correct an error of the Chief Justice in stating, that the respondent's counsel had admitted the collision to have been accidental and not proceeding from culpable negligence, whereas it had been admitted that there was no malicious or wilful intent, but it had been averred that the collision was occasioned by gross negligence.

Sewell, for the appellants.—The *Solicitor General*, (*Ogden*) and *Buchanan* for the respondents.

In a cause of collision against a steam vessel, the high court of admiralty, assisted by trinity masters, pronounced for damages and costs; holding that the steam vessel being more under command, and manifestly having seen the other vessel, was to blame. The trinity masters observed; whether the wind was N. W. as represented by the steam vessel, or N. N. E. is of no very great importance, as the vessel not receiving her impetus from sails but from steam, should have been under command. Steamboats from their greater power ought always to give way; upon this consideration, and also being satisfied that the steam vessel had seen the other vessel, they were of opinion the steam vessel was to blame. The court adopting this view of the case gave judgment accordingly. *The Shannon*, Pennefather, 2 Haggard's Adm. Rep. 173.

JOHN CLUGSTON, *Ex parte*.15th Feb.
1831.

A minister of a Presbyterian congregation, in communion with the church of Scotland, is entitled to registers, for marriages, baptisms and burials, notwithstanding that in the place where he officiates, another church, also in communion with the church of Scotland, has been previously established under the authority of the government.

Quære. As to any right in the minister to fees for entries in such registers.

THIS was an application by petition on the part of the Reverend John Clugston, Minister of the Presbyterian Congregation of St. John's Church, in Quebec, for two registers, numbered and authenticated,—*paraphé*,—under the statutes 35th, Geo. III. c. 4, 44th Geo. III. c. 2, and 9th, Geo. IV. c. 8, for registering marriages, baptisms, and burials; against which a caveat had been entered by Dr. Harkness, the Minister of St. Andrew's Church, at Quebec, in communion with the Church of Scotland. The petitioner set forth that on the 5th January, 1825, he had been licensed by the Presbytery of Glasgow to preach the Gospel, and having been appointed to be minister of a certain protestant church or congregation in Quebec, in communion with the church of Scotland, called St. John's church, he had been ordained to the ministry on the 16th June 1830, at Forfar, in the form used by the church of Scotland.

The principal objections to the application were, 1. That there is in Quebec but one protestant church or congregation, in communion with the church of Scotland, of which there is and has been, since 1820, a minister, recognized as such by an instrument of the Governor, Sir Peregrine Maitland. 2. That St. Andrew's church is sufficiently large to accommodate all the congregation of the church of Scotland, and that he is able to discharge the ministerial duties towards

all the said congregation. 3. That, according to the laws of the church of Scotland, no second church can be erected without notice to the minister and elders of the first, and that no notice had been given. 4. That up to the petitioner's arrival the congregation of St. John's chapel was not in communion with the churches, either of Scotland or England, and that their tenets differed from both.

The case was first argued by the counsel of the petitioner before the Chief Justice at chambers, when it was contended, that if the privilege claimed by the minister of St. Andrew's church were to be admitted they would go to the utter exclusion of every other branch of the same church ; and if so, how could a second church be ever erected ? The congregation of St. John's church was a congregation *de facto*, which appeared from its number being upwards of 200. That there are no stated ecclesiastical divisions of the Scotch church in Lower Canada, and there is no more repugnancy in there being one congregation in St. Anne-street, and another in St. Francis-street, depending upon the same general presbytery, than there would be in a Scotch congregation being formed at Quebec and another at Cap Rouge, Batiscan or any other place. The distinction of theological tenets is perfectly irrevelant, the discipline and government of the congregation being alone in question.— The examination, admission, and ordination of ministers belong to the general presbytery, and its power cannot be controled by the minister of St. Andrew's church or by government. The interference of the governor was illegal and void, it was interfering with

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the religion of the empire. (a) The colonies belong to the empire and not to the crown alone. (b) With regard to the evidence of the forms being observed, &c. they were not material, for the act of the presbytery was a judicial act, and *omnia præsumuntur rite et solemniter esse acta, donec in contrariam probetur*. (c) There is, therefore, a due guaranty, for the only guaranty the legislature contemplated was a regular ordination in one of the established churches.

The further argument of the cause was adjourned to this term, when it was urged in support of the caveat,—that a congregation was not known to the court or government, only a church ; that in fact the association of protestant christianity who assembled at the St. John's chapel were no more part of an established church than a lodge of freemasons, or a cricket club ; they were, speaking of them as religionists, in fact, congregationalists, a set of protestants who reject all church government, except that of their own individual congregation under the direction of one pastor : registers are given for public purposes and inheritance of property of every description depends on them : this is but an application of a private society, and where is the guaranty as to the regular and proper keeping of them ? To keep registers and take fees for the entries would be infringing upon the legal ecclesiastical emoluments of the only minister of the church of Scotland who is acknowledged by proper authority ; and the application has been made without the knowledge of several members of their own society. We do not object to

(a) 5 Anne, c. 8.

(b) Vaughan, 402.

(c) Erskine, 1. 5. 10. p. 55, and Glassford, 515. 516.

the petitioner's officiating as a minister of the gospel, nor to the act of the presbytery licensing him to preach, but there is no evidence of the forms prescribed having been followed as to the ordination, or of a special ordination to this chapel ; which, if it be in communion with the church of Scotland, can only be considered in the light of a chapel of ease.

The counsel of the petitioner was stopped by the court, and they proceeded to give their judgment.

KERR, Justice. This reverend gentleman has brought himself within the spirit and the very words of the act, and cannot be refused his register,—as to any fees upon burials, &c. that is not a question with which the court has any thing to do.

SEWELL, CH. J. When this question was brought before me at chambers, I preferred to leave it to the court, that it might be more publicly agitated and known. Having been twice called on to consider it, once when a barrister, and afterwards whilst holding the situation I have now the honour to fill, I am well prepared to enter into all its bearings ; but, coinciding perfectly in opinion with my brother judges in this instance, it is not necessary to dwell at great length upon it, as there are no special circumstances attending this case. By statute, all protestant churches established in a certain way are entitled to have authenticated registers ; but there is a wide difference between the right to keep a register, and the right of demanding fees for entries therein. The court is bound to give a register to this individual praying for it, who, it is admitted is an ordained minister within the words of the statute, (a) it is given in

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(a) Vide supra, 89. 149.

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obedience to the statute, but we give it to the petitioner to make use of it in such a way as the law may allow. If by any means any other party is injured he has his right of action, we do all we can do, direct the register to be authenticated (*paraphé.*) leaving the individual to make use of it at his own discretion, and upon his own responsibility. The statute grants a register to the minister performing parochial or clerical duty and here is a distinction, the minister doing parochial duty could take his fees whether by law or conventional agreement ; but not so a minister simply performing clerical duty : and with respect to these duties a difference might likewise be made ; baptisms and burials are ecclesiastical duties, but marriages are partly civil and partly ecclesiastical, and I do not think that they come within the term of clerical duties simply. It has been asserted that the congregation of whom the petitioner is the minister is *only* a private society, and if it were so, and he had no other right, it could not be supposed that a lodge of freemasons, or any other private society, could appoint any one, and constitute an officer to carry on the provisions of a statute ; but the petitioner did not come forward as the minister of a private society ; he stood before the court in a public capacity ; he calls himself an ordained minister, ordained by due authority, which is admitted because not denied ; he is no doubt therefore within the letter of the law. If however, he assumes a right, in consequence of this register, to do what Dr. Harkness contends he alone has the right to do, to take fees, he must do it at his peril. I have before me a case that occurred in Scotland. It was that of an episcopal congregation, from which there

were dissenters, and not belonging to the established church, or parochial regulations; the court found that the parish register alone was entitled to fees, and that the clerk of the sessions could officially recover from all persons the fees of right due to the parish. Here, under the same rule of discipline, Dr. Harkness may say, mine is the mother-church; and by granting this register, it must be understood that the court does not, and cannot affect the rights of any party.

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Judgment for the petitioner.

PARANT AND ANOTHER *against* GRENIER.

ON the 19th day of November 1827, Olivier Grenier caused an attachment to be made of the brigantine Barbadoes, then ready for sea, belonging to Parant and Bisson, on a demand for the amount of a promissory note. The vessel was thereby prevented from sailing until security was given. She sailed on the 23d, and was wrecked in the St. Lawrence, two days after her departure. The action in which the attachment issued was afterwards dismissed, and the seizure declared null on the ground of the note not being due when the action was instituted, and this was an action for damages alleged to have been caused by the illegal seizure of the vessel.

4th April,
1831.

A vessel loaded and ready for sea, can be arrested for a civil debt unconnected with the ship.

Huot, for the plaintiffs.—*Hamel*, for the defendant.

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 PARANT  
 AND  
 GRENIER.

KERR, *Justice*. The question in this case is whether a vessel can be detained for a civil debt unconnected with the ship, when she is loaded cleared and ready for sea? By the act of the defendant she was detained until the 23rd November. So late in the season as to expose her to the greatest risk, and whereby her loss was probably occasioned. There are rules arising out of the growth of maritime commerce other than the mere letter of the law, by which this case should be decided. The 10th and 11th articles of the French ordinance of 1681, which regulated maritime cases, gave to the judges of the admiralty court extensive power, but no where authorizes them, by a *saisie arrêt*, to detain a ship when afloat, far less when ready for sea. No vessel when afloat can be seized unless for a maritime debt, *Usages et Coutumes de la Mer*. Debts *purement civiles* are excluded, upon the principle that the ship is under mortgage for performance of the charter party, and mortgaged also to the cargo for performance of the voyage, whilst the goods are bound to the vessel for freight and general average. If by the old admiralty law a vessel afloat cannot be attached but for a maritime debt, it certainly cannot be by the ordinance 25th Geo. III. or by the 34th Geo. III. In England, in the Lord Mayor's court where the powers of attachment are the most extensive of any, ships, or goods laden therein, are specially excepted, and not liable to attachment. This exception is for the protection and preservation of commerce.— If attachments of this nature are sanctioned in this port, the shipping interest must greatly suffer. It has been argued that, at the most, this is an action for a trespass, without any proof of malice; but a misuse of

the process of the court has been made, and the innocence of the intention is not to be considered. I am of opinion that the plaintiffs are entitled to judgment.

SEWELL, CH. J. The question is not whether any loss has ensued in consequence of the seizure, but whether the vessel was seized according to law. We have no occasion to refer to the laws of England, as we have a statute of our own (a) which renders the estate, debts and effects of a debtor, of what nature soever, and whether in the hands of the owner or of any one else, liable for debt. We may go farther and look to the old French law. The ordinance of 1681, to do away with the French common law, declared that ships should not be liable to attachment. This ordinance was set aside by the introduction of English admiralty law, and the exemption of shipping destroyed. Between the 14th and 27th of the King, many ships were attached, and it was then thought proper to interpose a certain protection, but that was afterwards taken away by the 27th, and many instances of attachment and sale of vessels have occurred. The law being positive, any reasoning upon the interest of trade or shipping is unavailing. So far as to the law, then as to the facts of this case; the damage is too remote to be charged to the act of seizure; the seizure took place on the 19th November, security was given on the 20th, and the impediment to the sailing of the vessel removed. How did it happen that she did not go to sea until the 23d? Damages, then, which were charged to one cause were occasioned by another.

BOWEN, *Justice*, concurred in the foregoing opinion.

Judgment for the defendant.

(a) Vide supra, p. 379, in note.

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v.  
GRENIER.  
Jury  
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The court  
ordered that  
the plaintiff  
should pay  
the costs of  
the defendant  
and the  
costs of the  
court and  
the costs of  
the jury.

McLEOD *against* MEEK.

20th June,  
1831.

In an action of assumpsit by the endorsee against the endorser upon a note endorsed for a sum less than that made payable by the note, the plaintiff cannot recover.

**T**HIS was an action of assumpsit for the recovery of £19 from the defendant as endorser of a promissory note for £25, endorsed by the defendant in blank.—Plea, the general issue and usury in the transfer of the note to the plaintiff. The note was offered to the plaintiff by the defendant, who was indebted to the plaintiff in a small sum. The latter refused to advance any money upon it, but advised the defendant to apply to the banks where, if the note were good, it would be discounted. The defendant made a second offer of the note to the plaintiff, stating that he could not get it discounted, and requested cash for it as a favor, he stated also, that he would consent, on account of the risk to be incurred by the plaintiff in taking the note, the credit of the maker being doubtful, to take less for it than its real amount. The plaintiff then paid £22. 10s. for the note, when it was endorsed and delivered over to him.

*Hamel*, for the plaintiff, contended that as the note was delivered by the defendant, after the actual risk was fully established, both as respected the maker and endorser, the transfer could not be considered otherwise than as a *bonâ fide* sale, the sale of a debt due, such sales being sanctioned both by the French and by the English law, (a) and therefore, the contract was not at all usurious.

(a) Pothier, Vente, No. 574. Ib. Contrat Aleatoire. 2 Evans' statutes and Jacob's Law. Dict. v. Usury.

*Gairdner*, for the defendant. All the requisites to constitute usury are fully apparent in this case. There is a loan of £22. 10s. the money to be returnable at all events, and the sum of £2. 10s. taken as a discount for the time that the note had to run, a sum equal to about 50 per cent per annum, contrary to the provisions of the ordinance 17, Geo. III. cap. 9. The advance of the money is admitted, and the obligation to repay was imposed by the defendant's endorsement.—The nature of the contract cannot be altered by calling it a sale, and where a loan is the real object and intention of the parties no colour or form can give it a legal effect if usurious. (a) Taking more than the legal interest upon the discounting of notes, has been uniformly held to be usurious, since the decision of the case of *Massa v. Dauling*. (b) It was, even, formerly held to be usurious if the interest were deducted before the expiration of the time for which the principle was forborne. (c) This decision was afterwards modified in favor of bills, on which it was allowed to take interest in advance, and at a later period the courts decided that a sum greater than the legal interest might be taken as a remuneration for the additional expense incurred in an establishment for discounting, or for the risk and trouble of remittance. (d). But this remuneration must be reasonable. In *Brooke v. Middleton*, (e) the defendant in discounting had charged 7s. 6d. per cent, but no evidence was given of extra expense or considerable trouble, and Lord *Ellenborough* was of opinion that the

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 v.  
 MEEK.

(a) *Lowe v. Waller*, 2 Douglas, 736. *Barclay v. Walmsley*, 4 East, 55.

(b) Str. 1243. (c) Cro. Jac. 25.

(d) *Masterman v. Cowrie*, 3. Camp. 488. *Hammett v. Yea*, 1 Bos. and Pull. 144.

(e) 1 Camp. 445.

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 MCLEROB
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transaction was usurious. The plaintiff has supposed that by not demanding payment in full, he can recover on the note, but the usury is in the inception, not in the execution of the contract. Our ordinance, in conformity with the English law, makes all securities tainted with usury, void. In *Masterman v. Cumie*, Lord *Ellenborough* said, "a debt founded on usury is no debt at all." When there is usury between endorser and endorsee the note is vitiated, and no action can be maintained on it. (a) As respected the risk there was none greater in this case than in any other, the risk that had been incurred was the ordinary risk of insolvency, incident to all loans and credits generally. If the defendant had not been a party to the note, but had transferred it *sans recours*, without prejudice, he might have been justifiable in taking more than legal interest, for in that case there would have been more than ordinary risk. The true criterion by which this case should be decided, is to be found in *Evans'* statutes, (b) where after stating that there are many cases in which it is taken for granted, that deducting more than legal interest for the discount of a bill, for the time it has to run, is usurious, he adds, "I conceive that these cases are only considered applicable when the party from whom the discount is taken, is to bear the risk of the solvency of the other parties, and not when the bill is purchased for a smaller sum than the amount, deducting intermediate interest, at the risk of the purchaser."

SEWELL, CH. J. There does not appear to be any intention of usury on either side, yet the plaintiff having

(a). *Floyer and Edwards, Cowp.* 115. *Parr v. Eleason*, 1 East, 92.—*Daniel and Cartony*, 1 Esp. 274. *Ellis' Law of Debtor and Creditor*, 148.

(b) Vol. 11. p. 269, in note.

taken £2. 10s. for the price of his forbearance against the defendant, is not entitled to sue him on this note, for which he has his recourse against the maker, and after failing there, might still have recourse upon Meek, though not by an action of assumpsit. If the plaintiff is entitled to recover from the defendant, it is only on proof of damages arising from the failure of the maker, which does not appear. On this ground, but not on the ground of usury I think that this action cannot be maintained.

KERR, *Justice*. I am also of opinion that this action cannot be maintained, and agree with the judgment of the court, but not on the principle upon which it has been rendered. I consider that the contract between the parties was an usurious contract, and if any consideration had been given for forbearance, beyond the legal interest, it was usury; the only mode by which it might have been avoided, would have been by an endorsement "without recourse." In my opinion, this action should be dismissed on account of its usurious origin.

The provincial law against usury is to be found in the ordinance 17th Geo. III. cap. 3, § 5, whereby it is enacted that, "it shall not be lawful, upon any contract, to take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of six pounds, for the forbearance of one hundred pounds for a year, and so, after that rate for a greater or less sum or value, or for a longer or shorter time; and the said rate of interest shall be allowed and recovered, in all cases where it is the agreement of the parties: that interest shall be paid; and all bonds, contracts and assurances whatsoever, whereupon, or whereby a greater interest shall be reserved and taken, shall be utterly void; and every person who shall, either directly or indirectly, take, accept and receive a higher rate of interest, shall forfeit and lose, for every such offence, treble the value of the monies, wares, merchandize and other things, lent or bargained for; to be recovered by action of debt in any of the courts of common pleas in this province; a moiety of which forfeiture shall be to His Majesty, and the other moiety to him or them, that will sue for the same." It will be seen that the terms of this ordinance are the same as the statute 12, Anne, St. 2, c. 16, and the whole body of the decisions of the English courts upon this latter statute serve to guide us in the construction to be given to the above ordinance.

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DONEGANI AND OTHERS *against* DONEGANI.

18th June,
1831.

An alien cannot devise by last will and testament.—The succession of an alien will devolve to his grand children, natural born subjects to the exclusion of his own children who are aliens.

THIS was an action *petitio hereditatis* brought by the plaintiffs as the grand children and sole heirs at law of the late John Donegani against the defendant, their uncle, one of the sons of the deceased. In the year 1794, the said John Donegani, an Italian by birth, emigrated to this country with his family, and settled at Montreal, where he remained until the year 1802, having in this interval of time amassed considerable property. By his last will and testament bearing date at Montreal, the 23d day of July 1800, and a codicil of a subsequent date, he constituted his three sons, including the defendant, his universal legatees. To his daughter, the mother of the plaintiffs, who had intermarried in this country, and of whose marriage the plaintiffs were the issue, he bequeathed a legacy of £500. The testator afterwards died in his native country. The universal legatees thereupon entered into possession of his estate, which the plaintiffs in this action claimed by reason of their birth within the dominions of His Majesty, and their being the only legal heirs of the deceased, to the exclusion of the defendant, and their other uncles whose character of aliens, they contended, rendered them incapable of taking any portion of the property of their deceased parent either by right of inheritance or by devise.

Buchanan, for the plaintiffs, The statute of William

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III. (a) which expressly militates in favor of the plaintiff, is only affirmative of the common law. Had its provisions, however, been adverse to the pretensions of the plaintiffs, they would be inapplicable, as this case is to be governed by the principles of French jurisprudence, which are decisive as to the right of the plaintiffs to recover. The acquisition of real property by transactions *inter vivos* is competent to all persons, as a natural right *jus gentium*. (b) On the contrary the right of succession and inheritance, and that of devising, *testamenti factio*, are dependant upon the peculiar law of each state, and can be exercised by those only who are subjects or citizens of such state. (c) In accordance with these principles an alien may in England, take and purchase land, (d) although, departing from the *jus gentium*, the laws of that country permit the King to take the lands, so acquired by an alien, after an inquisition of office under the Great Seal. (e) By the French law aliens could not only purchase real estate, and hold it without danger of forfeiture to the

(a) By the 11th and 13th, Will. III. cap. 6, natural born subjects may derive a title by descent through their parents, or any ancestor, though they are aliens. But by the 25th Geo. II. cap. 39, this restriction is superadded, viz: that no natural born subject shall derive a title through an alien parent or ancestor, unless he be born at the time of the death of the ancestor who dies seized of the estate which he claims by descent, with this exception, that if a descent shall be cast upon a daughter of an alien, it shall be divested in favor of an after born son; and in case of an after born daughter or daughters only, all the sisters shall be coparceners. This exception, as it should seem, would have been quite superfluous if Lord Coke had not held that a son of an alien could not inherit from his brother, though the contrary had been since determined.—*Harg. Co. Litt.* 8. a.—*Ch. Bl. Com.* 374.

(b) Pothier, Propriété, No. 19. Des personnes, No. 578.

(c) Pothier Cout. d'Orléans 489, 576. 1 Rutherford's Institutes of Nat. Law, 97. 2 Ib. 108. Pothier Tr. des personnes, 578. 9. des Don. Test. 330.

(d) Co. R. IX. 141. Co. Litt. 2. 6. Viner v. Alien, A. 1.

(e) 5 Co. R. 52. Sugden's, Law of Vendors, 586. 1 Wood, Lec. 372.

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Crown, but could convey it away by title *inter vivos*. (a) And although the alien could not generally devise such lands, he was at liberty to do so in favor of his children who were natural born subjects. (b) So aliens could not inherit real estate nor transmit it to their heirs who were foreigners, (c) but if such heirs were naturalized, or there existed heirs natural born subjects, the estate did not devolve to the Crown, but descended to such naturalized or natural born heirs. (d) So far was this doctrine extended in France, that a grand-son, being a natural born subject, excluded his father an alien, and natural born subjects of remoter degree of consanguinity, were preferred in successions to nearer alien blood. (e) The main point for consideration, therefore, is whether these principles of the French law should govern the present controversy, and a correct view of the established jurisprudence as to the King's prerogative, would lead to the conclusion that they were the proper rules of decision. As to the King's prerogative rights they are divided into two classes, the transcendent or fundamental rights upon which the King's authority and political character depend, and those of minor consideration. The former are regulated by the law of England, which so far extend over the whole empire, the latter are defined by

(a) Delhommeau, Maximes du Dr. Fr. 37. 2. Poullain Duparc, Prince, du Droit Fr. 19. Bacquet du Dr. d'Aubaine, ch. 18. No. 4. Loisel, des personnes, No. 51. Pothier des personnes. No. 578.

(b) Lefevre de la Plâche, Traité du Domaine, 126-7. Le Bret. Tr. de la Souver. 122. Delhommeau et Bacquet, l. c. Poth. Cout. d'Orl. 489. Des personnes 578-9. des Don. Test. 330.

(c) 2 Poullain Duparc; 24. 1 Domat, 262.

(d) Le Brun des Successions, 13. Louet et Brodeau, A. 16. 2 Lefevre, 127-8. 156. Loyseau des Seign. ch. 12. No. 115. 2 Domat, 35. Nouv. Den. v. Aubaine, § vi. 1 and 2 Bacquet, Loisel, Poullain Duparc, &c.

(e) Coquille sur Nivernois, art. 24, p. 432. 2 Lefevre, 128, note.—Louet and Brodeau, Poullain Duparc, and Loisel, l. c.

the local laws of the colony. (a) Among such minor interests of the Crown, are classed all feudal incidents, rights of forfeiture, escheats whether *defectu sanguinis seu heredis*, or otherwise, and consequently they must be governed by the local laws of the province which, in this instance, regulate merely the right of succession to property by excluding the Crown from the *Droit d'Aubaine*, and conferring the succession of the late John Donegani upon his grand children, natural born subjects in preference to his son, their uncle, who is an alien. This could not be deemed a question of public law, or one involving political considerations. The policy of the law in any country as to an alien's property, would be the preventing its descent into the hands of foreigners and no more, and it would seem highly unjust that a natural born subject, though of alien parents, as he becomes by birth entitled to all the civil and political rights of a subject, should not reap the fruits of his ancestor's industry in preference to the Crown claiming under a feudal right rarely if ever exercised.

Walker and *Mondelét*, contra. The question is one of constitutional law, and to be regulated by the political law of England, which must be uniform throughout the empire, and extend to such parts of the dominions as are governed by their own local laws. The rule of law, applicable to aliens in England, is founded on political as well as feudal principles, not imposed as a penalty of forfeiture at the discretion of the Crown. Political rights could not be different in different parts of the same empire. The question is one affecting

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(a) Chitty on the Prerogative, 25, 119, 149, 229. 1 Bl. Com. 240, 281, 296. 302.

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the sovereign authority, with reference to foreign intercourse, domestic government and civil polity, and it is the fundamental policy of the parent state, that an alien, whilst his allegiance is local and temporary, should not be at liberty to exercise dominion over property, and a law, clearly of political regulation, could not be dispensed with as a minor prerogative. To adopt the law of France, as laid down by the authors cited, would be to extend to aliens, in a British colony, all the benefits of naturalization, with respect to the acquisition and disposal of property *inter vivos*, and its transmission by inheritance, in defiance of the policy of the parent state. Hence it is inferred that recourse should be had to the laws of England, and that as in that country the possession of the alien, or his descendants was respected where the interests of the state, or the will of the Sovereign did not interfere, the plaintiffs as deducing title from one who, by the law of England, could neither acquire, or transmit by inheritance, in opposition to the equitable possession of the defendant, arising out of the will of the deceased father, and sanctioned by the absence of all interference on the part of the state, were entirely destitute of claim. Besides, the application of the law, which the plaintiffs invoked, is based upon a principle so subtle as almost to escape analysis and would generate a most glaring injustice, “*quand les étrangers ont des enfants nés en France et y demeurant, ils leur succèdent, et leurs frères nés hors de France et demeurans en France, succèdent avec eux au père.*” If any one of the children could be regarded as a natural born subject the interdict was removed as to all. The defendant although an alien born is a resident of the province. If

the mother of the plaintiffs had been a natural born subject, the favor attached to that character would have qualified her brothers, although aliens, to succeed; they would have taken a fourth of the inheritance each; but the mother being dead, and the doctrine of succession *par représentation* being done away with to favor the nearest natural born heirs, the grand children acquire a right which their mother, had she been alive, and a natural born subject, would not have been entitled to, they exclude the uncles and take the whole. The mother could only have taken a fourth; the plaintiffs claim to exercise a more extensive right than their mother would have had, had the latter been alive and qualified to inherit in her own right. It is further contended that the circumstance of the plaintiff's having been born within the realm ought not to affect the equity of the defendant's case. The latter was not at liberty to select the place of his birth, but from his earliest years he has lived within the king's allegiance, repaying protection by duty and contributing by his efforts to the sum of domestic prosperity. He is an accepted citizen of the State, and the law which has been invoked by the plaintiffs professes to sanction the acquisition of property by aliens, as a right *juris gentium*. If such were the case the right of devising ought to be consequent upon that of acquiring. If the defendant could have taken from his father by deed of gift *inter vivos* there was no reason to militate against his taking by devise. The law of France, in fact, was originally in principle what in England it continues to be. The alien could have no heirs of his blood. The acquisition of real property was a right springing out of the social rela-

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tions of the community and confined to its citizens. Harsh and rigorous, however, as the law of alien disabilities in England might appear to be, it possesses superior advantages to that of France. The question there was between the alien and the State alone. The law there held out no premium for a violation of the ties of natural affection and the domestic charities of life. It did not prohibit the disposal of personal estate by will. In France, the power of testing, even of personal estate, is restricted to the direct descendants natural born. The claim by this action embraces the entire personal as well as the real estate. The laws of England hold sacred the possession of the alien or his descendants from whatever title derived when it did not interfere with the interests or exigencies of the State.

Buchanan, in reply.

PER CURIAM. The rule adopted in England does not apply, and the law giving to the crown the escheat of lands acquired by an alien could have but little application to colonial settlements, or the principles of colonial government. This province is in possession of a system of laws sanctioned by the parent State, to which the decision of the case is referrible. It ought to be the policy of the country to encourage settlement, to create for the stranger an interest in the soil, to attach him to the country by social ties. It might seem hard that he should not have the power of disposition by will, but the law is express. The right which, it has been said, existed in the crown is a minor prerogative, such as the territorial rights of *quint, lods et ventes* and others. We must have recourse to the laws of France to decide this case. The grandfa-

ther could purchase and acquire, as also dispose of his property by deed of sale, deed of gift *inter vivos* or otherwise, but he could not devise by last will. *L'étranger est capable des actes du droit des gens les actes du droit civil lui sont interdits, liber vivit servus moritur.* The legal right to the entire estate is in the plaintiffs, as lineally descended from the grandfather: they claim, not by representation of their deceased mother, but as the nearest descendants competent to inherit.

Judgment for the plaintiffs.*

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ON APPEAL FROM MONTREAL.

WILLIAM SCOTT, *et ux*.....*Appellants.*  
 and

JOHN PRINCE.....*Respondent.*

25th July,  
 1831.

**I**N the month of June 1822, the respondent recovered a judgment against the appellants, jointly and severally with three other persons for damages, in an action for an assault and battery. This judgment was reversed in appeal so far as respected William Scott, one of the appellants. On the first day of May 1824, a writ of fieri facias was issued against the goods and chattels

*A contrainte par corps, against a married woman, upon a judgment for principal, interest and costs, cannot be obtained.*

\* Affirmed in appeal the 30th day of April 1832, and subsequently before the Privy council.

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of Catharine Ferguson, one of the appellants, to which the sheriff made his return on the 14th day of July following, that he could not execute the same as the door of the appellants' domicile was fastened and he could not obtain admittance after a demand made upon a grown person in the said domicile. On the 15th day of June 1829, a service, by one of the bailiffs of the court of King's Bench at Montreal, of the judgment above mentioned, and a demand of payment of the same was made on Catharine Ferguson, and at the same time she was notified that to the payment of the said judgment and costs she would be constrained by all lawful ways, even by imprisonment of her body *après quatre mois*. On the 15th February 1830, a rule was granted by the court below, at the instance of the respondent, ordering that a *capias ad satisfaciendum* or *contrainte par corps* should issue at the expiration of fifteen days to take and detain the body of the said Catharine Ferguson in satisfaction of the said judgment. On the 19th of February the court pronounced its judgment upon the above rule, wherein, after stating the demand above mentioned and the return of the bailiff that he had declared to her that she would be constrained by her body *contrainte par corps*, &c, it was adjudged, "that the said Catharine Ferguson should, within fifteen days from the service of the present judgment, be attached by her body to pay to the plaintiff the said sum, &c." From this judgment the present appeal was instituted.

The parties having been heard, the opinion of the court was pronounced by

SEWELL, CH. J. By the ancient laws of France the *contrainte par corps* was allowed in every case of debt,

and this continued to be the rule until the year 1254, when it was abrogated by the ordinance of St. Louis, except as to debts due to the crown. The *Ordonnance de Moulins* restored the ancient law, but exempted women and men of seventy years of age from its operation. (a) The code civile in 1667, in its turn, abolished the general provisions of the *Ordonnance de Moulins*, but continued the exemption in behalf of women and *septuagenaires*, (b) and confined the *contrainte par corps* to the several cases which it specially enumerates, among which are judgments for costs, *restitutions des fruits* and *dommages et intérêts* exceeding two hundred livres. The redaction of the *code civile* adapted the provisions of that statute to the state of Canada and provided that the infliction of the *contrainte par corps* should be left to the discretion of the judges, and such was the law at the time of the conquest. The statute 14th, Geo. III. c. 83, followed that event, and the first and second of the ordinances which were enacted by the legislative council of Quebec established the courts by which justice was, in future, to be administered, and the course of proceeding which they were to observe. In these the several instances where the *contrainte par corps* should after judgment be permitted, were, for the security of the subject, particularly declared, and the dangerous power of imprisonment at discretion, which the redaction of the code had reserved to the courts of the province under the government of France, was thus abrogated. But independent of what has

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(a) 3 Fevre de la Planche. Tr. du Dom. 296. 298.

(b) Tit. 34. art. 8. Serp. 659, et seq.



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been said, we are of opinion that women, other than *marchandes publiques*, even in France, were not subject to the *contrainte par corps après les quatre mois*, for costs. (a) *Quacunque viâ data*, the judgment of the court below must be reversed. \*

### ON APPEAL FROM MONTREAL.

WILLIAM SMITH PLENDERLEATH, *et ux.*.....*Appellants.*  
and  
WILLIAM MCGILLIVRAY, AND OTHERS.....*Respondents.*

19th Novr.  
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An interlocutory judgment adopting, without opposition, the account of a succession prepared by its order, passes in *rem judicatum*, and it is not competent to the representatives of a minor who was legally a party to the suit, to revive the proceedings and contest any particular item in the account. The court, however, may rectify any error of calculation.

**SIMON MCTAVISH** who had established an extensive trading and commercial house at Montreal, known

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The allowance of the *contrainte par corps après les quatre mois*, is discretionary with the court.

\* **WOODINGTON v. TAYLOR.**—This action was dismissed, and the defendant, upon the authority of the 2d article of the 34th title of the *Code Civile*, moved for a *contrainte par corps* against the plaintiff for the amount of his taxed costs "après les quatre mois." **PER CURIAM.** The *contrainte par corps* was originally established by the 48th article of the ordinance *de Moulins* in all pecuniary cases. l *Neron* 470; but was abolished by the *Code Civile*, art. 1, 2, 3; tit. 34, except in cases of judgment for costs exceeding 200 livres, and of judgments against tutors for principal or costs. The latter exception is not the present case, the former is. But the provincial *rédaction* of the *Code Civile* provides that the allowance of the *contrainte par corps* shall in such cases be in the discretion of the court, l *Edits et Ordon.* 223, and a case must, therefore, be shewn to the court whenever this extraordinary remedy is asked. No such case is here exhibited, and the plaintiff's demand was fairly and properly made, *Serpillon*, 650, l. 653. l *Sallé*, 540. *Rodier*, 676. 3. *Fevre de la Planche*, 296, 297.—This renders it unnecessary for us to enquire into the effect of the ordinance 25th Geo. III. cap. 2, upon the 34th title of the *Code Civile*, and we give no opinion on this point. The defendant takes nothing by this motion.—Vide *B. R. Q. Leddy v. McPharlane*, No. 1365. in the year 1829; also *Dearness v. Staller*, in the year 1834, No. 996. *B. R. Q.* 1829, No. 1157. *Bedard v. Hardy*.

by the name of the North West Company, made his will, by which he bequeathed legacies to his relatives and friends, in amount exceeding £100,000, and he died in the year 1804. Amongst these, he gave £20,000 to his son William, which sum is the subject matter to which this enquiry relates. He appointed his nephew and partner Wm. McGillivray, with Isaac Todd and James Reid, together with other gentlemen who did not act, as executors of his last will and testament.— He declared it to be his “will and desire, that none of “the foregoing legacies exceeding one hundred guineas should be paid out of his estate until seven “years, at least, after his decease, unless sufficient monies for that purpose should have been realized therefrom, without loss or inconvenience to the concern, “or concerns in which he was then a partner.” Matters remained in this state till October, 1811, when the seven years had elapsed, at which time the plaintiff, George Selby, a legatee for £200, brought his action against the executors to enforce the payment of his legacy. In this action the defendants fyled a plea, in which they admitted that they had assumed the execution of the testator’s will, and that estates, monies and credits had come into their hands to the amount of £95,420. 1s. 10d. out of which they had paid £34,660. 8s. 7d. leaving a balance of £60,759. 13s. 3d. for which they were accountable. Accounts of credits and debits were then fyled, but they alleged that the plaintiff must submit to a diminution of his legacy for want of sufficient assets to pay all the legacies. The court below in this stage of the cause pronounced an order calling upon persons interested in the estate and

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succession to come forward with their claims, and the legatees and others concerned in the same, in obedience to this order, filed their interventions, and thus became parties in the cause; William McTavish, then a minor, was represented by Henry McKenzie, in his character of tutor duly appointed. The court on the 18th June 1814, pronounced an interlocutor whereby they appointed a "*commissaire or examiner* to enquire " and report upon the state of the effects, and estate of " what nature soever of the said deceased, which were " at the time of his decease and since." And in order to enable him to lay before the court such information as would put it in their power to carry into effect as far as possible the intention of the testator, and to do justice to all parties, very full instructions were embodied in the interlocutory judgment. The examiner thus named, filed his report on the 11th October 1815, in which he states, that after examination of the accounts of McTavish, McGillivray & Co. and by "*access to their books and papers,*" the balance due by the house to the testator's estate, was on the first of that month £53,493. 3s. 10½d. in which sum is comprised interest from 6th July 1811, the date of the account current, to the 1st October 1815, upon the sum of £60,750. 13s. 3d. Thus this latter sum was reported to be *nominally* in the hands of the executors at that period, though it was not in their *actual* possession. On the 20th October 1815, the court below pronounced a judgment adopting the examiner's report, and declaring as the reason for such adoption, " that no objections to the said report had been made " or taken by any of the parties to the suit." In the same judgment they prescribe the course to be fol-

lowed, in order to carry the testator's intention into effect as far as was practicable.

In the year 1818, William McTavish, the residuary legatee, died, and his mother, one of the appellants, inherited his personal estate. The appellants having become invested with the rights of the residuary legatee, with a view of contesting the accounts of the executors' administration, revived his intervention by permission of the court, on the 11th October 1822, and by a supplementary demand, (*nouvelles conclusions*,) among other things alleged, "that they had a right to take such conclusions as the said McTavish might have done and to contest the account rendered by the executors in October 1811, as well as a supplementary account which they had fyled on the 13th October 1820, of their administration during the period which had elapsed since October 1815. That since the testator's death, the house of McTavish, Frobisher & Company, allowed to the executors, which they had received, interest on the money belonging to the testator in their hands, and on balancing the account current every year on the 30th November, debited themselves with the interest accrued during the preceding year, which was each year added to the capital then in their hands, and interest on the whole allowed for the following. That from July 1811, to October 1815, the executors had received, as interest, £17,434. 4s. 4d. and that they had accounted only for £9,546. 17s. 4½d. That from October 1815, to October 1820, they had received upwards of £6000 for interest, which, also they had not accounted for in their supplementary account. So that in respect of interest alone, the executors ought to have accounted for £16,447. 11s. in addition to the

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sums for which they had accounted. In conclusion, the appellants demanded the sum of £10,000, with interest from 1st October 1820, to be paid to them as residuary legatees after payment of all the other legacies." The respondents in answer to this demand pleaded that the proceedings of the court as above detailed, constituted a *resjudicata*, and a bar to these *nouvelles conclusions*. 2. The general issue. The appellants in answer to the *exceptio rei judicatæ*, replied that the judgment of the 20th October 1815, was rendered *ex parte*: that William McTavish was injured thereby, *lexé*, and consequently it was null and void; and that as soon as he became of age he was entitled to have the judgment set aside. Issue having been joined, and the parties proceeded to evidence, the court below subsequently rendered its judgment, wherein the demand for compound interest was dismissed. From this judgment the present appeal was instituted.

KERR, Justice. We are called upon to review and correct a judgment rendered in the court of King's Bench, at Montreal in this cause which involves interests of great magnitude to the parties concerned.

In the opinion of this court the whole merits of the case depend upon the effect of the judgment of the 20th October 1815, and the question is whether as respects the succession of William McTavish who came of age in 1817, and died the subsequent year, the claim of compound interest on those monies set up by the appellants in their *reprise d'instance*, has not by that judgment passed *in rem judicatam*? The authorities cited by the respondent's counsel shew, that though a minor at the time the judgment was rendered, being represented by his tutor, he is as much

bound by it as if he had been of full age, and the only course by which he can be relieved if injured, is by a proceeding for restitution *in integrum* on the *Requete Civile* (a proceeding which does not obtain in Canada) or by appeal. (a) But it has been contended that the judgment of 20th October 1815, is only an *interlocutory* decree, and that the appellants had a right to open up all discussion which might have been competent to them previous to rendering of that judgment, so as to have the alleged error corrected or annulled. Now, if all sentences which may be rendered between the commencement and conclusion of a suit, are to be considered as not definitive, the appellants' counsel would be quite right in the position they have maintained. But there are, according to *Voet*, interlocutory decrees which have all the effect of definitive judgments, and can only, if wrong, be remedied by appeal. "Dividitur Sententia," he says, "in interlocutoriam et definitivam. Interlocutoria est pronuntiatio aliqua de plano, super incidenti aliquo in principio vel medio litis facta, causam principalem non plene determinans," and then he goes on to say, "Non desunt tamen interlocutorie sententie, quæ vim definitivæ habent, dum irreparabile damnum infert earum executio, vel definitiva ex juris necessitate ad eas sequi debet." He proceeds to illustrate the proposition by examples, and amongst others we find the following:—"Aut judex deferat actori vel reo iurandum, tanquam in causâ dubiâ, ut secundum eum, qui juravit judicetur." The learned jurist then concludes the *sommaire*, "Quales interlocutorias vim definitivæ

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(a) 2 Poth. Tr. des Obl. 443. Poth. Pro. 148. 1 Pig. 557. 564. 566.

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habentes etiam post pronunciationem corrigi vel retractari non posse, verius est, maxime si ab iis appellatum fuerit." (a)

Though it is a positive injunction in the code civile, "qu'il ne sera ci après procédé à la revision d'aucun jugement rendu sur la cloture de compte, yet if the omission in the accounts by not adding compound interest were really an arithmetical mistake, a mere error in calculation, then indeed it would have been competent for the court below under the authority of the note of the 21st article of the 29th title of the code civile to correct the error, for it is there said, "si l'erreur de calcul avoit été commise en la sentence, elle pourroit être corrigé sans qu'il fut nécessaire d'en interjetter appel." This course of practice was taken from the Roman law, and it is there said, "quoniam error computationis appellare non necesse est, et citra provocationem corrigitur." But if it were permitted to the court below to enter into an enquiry whether the *compound* interest should be substituted and awarded instead of *simple* interest, it would virtually tend to admit their power to correct and amend their former definitive decree, and thus by changing the principle of the former judgment, materially affect the interests not only of the executors, but of all the legatees and annuitants under the will. The court below, indeed, did entertain an opinion that they might revise and correct their interlocutory judgment of the 20th October 1815, for they permitted the appellants no less than four years after the death of William McTavish to fyle their conclusions im-

(a) Voet ad Paudectas, lib. 42, tit. 1, § 4. De re judicata, &c.

peaching the interlocutory judgment. But on the 20th October 1826, eleven years afterwards, they adhered to their first judgment and dismissed the appellants' conclusions so far as respects the claim of compound interest. This court cannot but admit the principle contended for, that the appellants took up the reprise d'instance in the precise state and condition in which it stood at the death of William McTavish, and how did it then stand? A judgment had been rendered which in so far as regards William McTavish, whom they represent, definitively established the balance due by the executors to the succession on the 20th October 1815, and shall the appellants on whom, in the terms of English lawyers, "a descent has been cast," and who waited five years after the minor's death before calling in question the legality of that judgment, be placed in a more favored situation than he? It cannot escape our attention that the appellants though they claimed *en autre droit* were parties to the judgment of the 20th October 1815, and by their silence consented to it, for it is a maxim of law *qui tacet consentire videtur*. They must be presumed to have then been cognizant of the principle established in the report of allowing simple interest instead of compound interest, and having allowed so many years to elapse both before and since the death of William McTavish, without attempting to be relieved from the alleged error, they cannot otherwise be deemed but impliedly to have acquiesced in that judgment.

It is proper to mention that His Excellency Lord Aylmer has taken a view of this cause which I think perfectly correct, namely, that no such evidence has

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been given of the house of McTavish, McGillivray & Co. allowing compound interest on such sums as may have remained in their hands so as to remove all doubts on this point, and considering that the intention of the testator, as manifested in his will, was to maintain the credit of the house, and to grant them indulgence, we think, in adjusting our opinion on this matter that the respondents are clearly entitled to avail themselves of this favorable disposition of the testator towards the house. On the whole this court (one of the judges dissenting,) is of opinion that the judgment of the court below ought not to be disturbed.

Judgment affirmed.

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IN THE CASE OF DANIEL TRACEY.

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9th Feb.  
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The legisla-
 tive council
 has a right to
 commit, as for
 breach of pri-
 vilege in cases
 of libel,—and
 the court will
 not notice any
 defect in the
 warrant of
 commitment
 for such an of-
 fence, after
 conviction.

ON the 8th day of February 1832, a motion was made for a habeas corpus, directed to the keeper of the common gaol of the district of Quebec, or his deputy, to produce the body of Daniel Tracey in his custody, together with the day and cause of his detention. The motion being grounded on an affidavit, which was read, the court granted the motion. On the following day the prisoner was brought up and a return made by the gaoler, "That the body of the said Daniel Tracey had been committed to the common gaol of

the said district by virtue of a warrant from under the hand of William Smith, clerk of the Legislative Council in the words following, to wit :” LEGISLATIVE COUNCIL, *Tuesday, 17th January, 1832.*

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Resolved, That Daniel Tracey, of Montreal, having presumed to publish a libel against this house in the paper intituled, “ The Vindicator,” of Tuesday evening the 3rd instant, Vol. 3, No. 53, published in Montreal, is guilty of a high breach of the privileges of this house.

Resolved, That Daniel Tracey be for his said offence committed prisoner to the common gaol of the district of Quebec, for and during the present session of the provincial parliament.

Resolved, That the serjeant at arms attending this house do forthwith convey the body of the said Daniel Tracey to the common gaol of the district of Quebec, there to be kept in safe custody for and during the present session of the provincial parliament.

Attest. WILLIAM SMITH, clerk of the Legislative Council.

To WILLIAM GINGER, serjeant at arms, attending this house, and to the keeper of the common gaol of this district.

A. Stuart argued in support of the motion. This return brings under the consideration of the court one main abstract question of law, whether the legislative council can by law commit for contempt in the case of an alleged libel. But before proceeding to the consideration of this question there are upon the face of the conviction and commitment, which are the cause for the detention of the parties assigned in

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the return, other objections, which though certainly of minor importance when compared with this main and principal question, yet objections which could not be passed over in silence. Granting hypothetically, for the moment, that the council has the power to commit for contempt, the conviction must be examined with reference to the same rules of law which govern other convictions in courts of law. Now there are various fatal irregularities upon the face of the conviction in question. 1. It does not appear that the party convicted had notice of the complaint, and has been brought before the council by attachment or otherwise. 2. It does not appear that any opportunity has been afforded to the defendant to answer the charge, or that in point of fact any answer has been asked or given to such charge. 3. It does not appear that he was present when the conviction was made. 4. That the first proceeding on the part of the council as against the defendant is the commitment in execution, and that no precedents could be offered in support of such a proceeding. Even if the council should be held not to be bound down to the strict technicalities required in other convictions, and though it should be said, as was intimated by Lord *Ellenborough*, in the case of *Sir Francis Burdett*, that it was not necessary that a conviction for a contempt by one of the branches of the legislature should be drawn up "in a workman-like manner," still it could not be thence inferred that the essentials of judicial order could lawfully be passed over by them. No human tribunal has the right to convict without hearing the party accused or giving him an opportunity of being heard in his defence. It is unnecessary to urge

here, that it would not be competent to aid this substantial irregularity in the conviction by matter *dehors* it ; nor indeed has any attempt been made to do so. No precedents can be offered in support of such a conviction, but there is one in point against it, the case of *Perry*, editor of the *Morning Chronicle*, who was committed on the 22nd of March 1798, for a contempt against the House of Lords in publishing a libel in his paper against that body. The commitment is as follows :—“ *Die Jovis, 22^o Martii, 1798, The*
 “ gentleman usher of the black rod acquainted the
 “ house that James Perry had surrendered himself
 “ and was in custody. Whereupon he was ordered
 “ to be brought to the bar, and being brought to the
 “ bar accordingly, and heard as to what he had to
 “ say in answer to the complaint made against him
 “ of having published a libel upon this house in the
 “ paper intituled, *The Morning Chronicle, Monday,*
 “ *March 19, 1798, and having acknowledged himself*
 “ to be the proprietor of the said *Morning Chronicle,*
 “ he was directed to withdraw.

“ *Resolved, By the lords spiritual and temporal in*
 “ parliament assembled, that James Perry having pre-
 “ sumed to publish a libel on this house in *The Morn-*
 “ *ing Chronicle, Monday, March 19, 1798, is guilty*
 “ of a high breach of the privileges of this house.

“ *Ordered, By the lords spiritual and temporal in*
 “ parliament assembled, that James Perry do for his
 “ said offence pay a fine to his Majesty of fifty
 “ pounds ; and that he be committed prisoner to New-
 “ gate for the space of three months and until he pay
 “ the said fine ; and that the gentleman usher of the
 “ black rod attending this house, his deputy or depu-

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“ ties, do forthwith convey the body of the said James
 “ Perry to the prison of Newgate to be kept in safe
 “ custody for the space of three months and until he
 “ pay the said fine. George Rose cler. parliament.”

What is somewhat extraordinary the framers of the commitment in question here, seem to have had these proceedings under their eye, and have, notwithstanding, deviated from this form in the essential particulars above adverted to. If then the legislative council had legally cognizance of the alleged offences, it has been shewn, it is apprehended, that the proceedings by and before them have been so irregular as to render their adjudication merely null. But the jurisdiction of the legislative council over offences of this nature is respectfully denied, and if it can be proved that the law does not give to the council any such power, then the proceedings had in the premises by them, are *vox et præterea nihil*:—The conviction then would bear the outward form and semblance of authority only. It would be a mere shadow without any substance: and the party here would be entitled to his discharge, under the writ of *habeas corpus*, as being under duress of imprisonment without legal authority: and the question as to the jurisdiction of the legislative council in this matter, would come directly before the court, who would be called upon to determine upon the same.—The objection here goes to the very root of the tree, and the conviction being held void, the commitment founded upon that pretended conviction falls to the ground as of course. It has been sometimes argued that there being a conviction and a commitment under it, the court is bound at all events to remand, but this is a manifest error, the rule applies only to commit

ments by competent authority. In this last case it is admitted generally, but not universally, that the court could not upon the return to a writ of *habeas corpus*, assigning as the cause of detention a conviction, enquire into the grounds or reasons of that conviction.—These, it is sufficiently obvious, could only be gone into either upon an appeal, or upon a writ of *certiorari*, or upon a writ of error, according as the law gave one or more of these remedies to the party, alleging that he had been aggrieved by the conviction. The reason of this is, that the judgment being a judgment of a court, upon which the law had conferred jurisdiction over the subject matter, that judgment, generally speaking, could not be disturbed by any incidental course of proceeding; but must remain in full force and effect until it should have been reversed, vacated, or set aside by direct proceeding had for this purpose before the competent legal tribunals, and in the forms prescribed by the law. But these reasons militate directly against the assumption that a pretended conviction by persons exercising an authority which has not been conferred upon them by the law, shall be esteemed final and conclusive by the living organs of the law: or, that they shall give any effect either actively or passively to an usurped authority. There is no half-way house, the power exercised is either exercised with the sanction of the law or without that sanction; and in the last case it is exercised against the law and cannot in any form or way be countenanced by the law which it violates. It is a contradiction in terms to suppose that the law would lend its aid in support of an usurped authority. It has often been said that there could be no injury without a remedy, the quies-

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cence of the law in the case of usurped powers and its wilfully shutting its eyes to such usurpation of power would be a tacit co-operation and alliance of the law with the subverters of the law, and would leave the subject to suffer from illegal acts, without affording him any remedy, which would be contrary to this rule. And the true legal remedy in a case like the present is by the prerogative writ of *habeas corpus* which has here been brought. This doctrine is supported by the opinion of Lord Chief Justice *Wilmot*.^(a) It is not intended to be denied however, that if the legislative council had jurisdiction over the offence of libel, and if they had proceeded in due judicial order though summarily, to hear, try and determine this matter, the grounds of their conviction are not examinable here. Upon a point so clear as the present one, it might not perhaps be thought necessary to offer any authority, but misconceptions have obtained, which it is material to rectify; this is one of the disadvantages which counsel is subject to when obliged to argue a case, without counsel appearing on the other side, who might have relieved him from going into this part of the subject, by at once admitting the principle of law as stated.— This consideration in truth gives the vast importance

(a) The nature of this writ must first be considered: It is a demand by the King's supreme court of justice to produce a person under confinement, and to signify the reason of his confinement. In imprisonment for criminal offences, the court can act upon it only in one of these three manners: 1. If it appears clearly that the fact for which the party is committed, is no crime; or that it is a crime, but he is committed for it by a person who has no jurisdiction, the court discharges. 2. If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction; or it appears to be a crime, but a bailable one, the court bails him. 3. If an offence not bailable, and committed by a competent jurisdiction, the court remands or commits. The nature and quality of the act with which the party is charged, and the jurisdiction which has taken cognizance of it, are to be considered in the return.— *Wilmot's Decisions*, 107.

which belongs to the main and general question ; for, if it be held that the legislative council has jurisdiction over libel at all, then their power in relation thereto would be a power without any controul whatever. In referring to the opinions and arguments of that eminent lawyer, the late Mr. Hargrave, I refer to the opinions of a man who would be as little biassed by any utopian notions of perfection as by any radical prejudices. Consulted in the case of the commitment of the Honorable *Simon Butler* and Mr. *Oliver Bond*, by the Irish house of lords in 1793, for contempt and breach of privilege, by what they adjudged to be a libel on that body, he says, "considered according to the general turn and genius of the law of England, the legality of the imprisonment and fine in question, could not I conceive, be supported ; because by the general rule of our law, an accused person can neither be put on trial for a crime, without the presentment of a jury, nor in case of a denial of a crime be tried for it without a jury of his peers, nor in a criminal trial be himself interrogated ; and in every one of these points the present case seems a deviation." And he goes on to point out some exceptions to this general rule as in the cases of information *ex officio* for misdemeanors, contempts against the courts of Westminster Hall, summary criminal jurisdiction given to justices of the peace by statute, criminal jurisdiction exercised in certain cases in the ecclesiastical courts, &c. And again, being consulted in 1798 in the case of Perry, whose commitment has already been referred to, he says, "proceedings in either house of parliament for contempt and breach of privilege, more especially where, as in the present case, the

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“ charge is for a libel, are in their nature very con-
“ trariant to the ordinary rules and course of admi-
“ nistering justice in England. The offended parties
“ act as judges. The court is not an open one. The
“ witnesses against the accused party are originally
“ examined in his absence. The accused party is
“ called upon to defend himself, without the oppor-
“ tunity of cross-examining the witnesses against him.
“ He is not in general allowed to have the benefit of
“ counsel. He is in some degree interrogated against
“ himself. He loses the benefit of trial by jury ;
“ and if the imputation is for a contempt against the
“ house of lords, and the accused is a commoner, he
“ is tried, not by persons of his own order, but by
“ those of a distinct and a higher one. The judg-
“ ment is said to be, not only unappealable, but
“ wholly unexaminable, except by those who pro-
“ nounce it. All this variety of hardship, upon the
“ party accused, I understand to be at least incident
“ to the ordinary proceeding for contempt against
“ either house of parliament. But if the contempt
“ be publishing a libel, which is the case now before
“ me, there is a still further hardship : for in the first
“ instance and before hearing of the accused party, it
“ is sometimes adjudged, as it appears to have been in
“ the present case, that the offence has been commit-
“ ted ; and so it is only left to the accused to con-
“ trovert his having committed it. This seems a very
“ severe deviation from the common course of crimi-
“ nal justice. Surely it is essential to the defence of
“ the party accused, that he should have the oppor-
“ tunity of shewing, not only that the fact charged
“ was not done by him, but that such fact is not an

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“ offence ; and denying the latter to him appears like
“ adjudging one half of the case without a hearing.”
“ In the former of these cases he says further, “ that
“ though in a criminal case the accused party may
“ have been examined on oath, may have been tried
“ on information only, or may have been adjudged
“ without a trial by his peers, it is not of necessary
“ consequence, that the proceeding should be illegal.
“ To decide that point it should be previously consi-
“ dered, whether the case falls not within some spe-
“ cial rule or course of proceeding. The *onus* indeed
“ of taking the case out of the general rule falls upon
“ those who claim benefit of the exemption. But if
“ they succeed in the proofs, it is a vain objection in
“ point of law to say, that the general principles of
“ the law and constitution are to the contrary. If
“ the exception is established, whether it be a reason-
“ able exception or not, it ought to prevail, until
“ revoked by legislative or other competent autho-
“ rity. In the present case, therefore, I conceive the
“ true question to be whether the case is, or is not,
“ one of the cases excepted from the ordinary course
“ of criminal prosecution.” As in Great Britain and
Ireland the power to convict and punish for a libel by
either house of parliament, as for a contempt against
one or other of those bodies, could only be maintained
by shewing that it was supported by law as an excep-
tion to the general rule, so also in Lower Canada,
where the English criminal law obtains the power of
the legislative council to convict and punish for a
libel could only be maintained by, in like manner, es-
tablishing, on sufficient legal grounds, the exception
to the general rule, which as a general rule stands ad-

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mitted by all. Now, at the very threshold, we are struck with a marked difference between the two English houses of parliament and our own. The origin of the powers of the English houses of parliament goes back to a very remote antiquity, they at one time formed a part of the *Aula Regis*, and claimed to have all those judicial powers which had not been transferred to the king's courts after the breaking up of the *Aula Regis*. The house of lords has long exercised, and now exercises, the highest judicial powers of the state. The contest between the two houses upon this head may be seen in the case of *Fitton and Carr* in 1667, and after the restoration, in the case of *Skinner* and the *East India Company*, in the case of *Sir Samuel Barnardiston*, and in the case of *Bridgman and Holt* in the common pleas, and of *Shirley and Fagg* with which last case the controversy ended. There is also the notorious *Aylesbury* case. (a) It does not seem necessary to enter into the detail of any of these cases. They are referred to, generally, as evincing essential differences between the constitution of the two branches of the British parliament, and the two branches of the provincial legislature, where pretensions so lofty as these were made by both branches of the British legislature, to judicative power, and where as to one of them they were to so large an extent maintained, that the practice of attaching for con-

(a) The whole learning upon this subject is to be found in Lord Chief Justice *Hale's Treatise on the Jurisdiction of the Lord's House of Parliament*.—In Hargrave's Introductory Preface thereto.—Hargrave's Juridical Arguments—together with the judgments of the Courts in *Brass Crosby's* case. 3 Wils. 198.—Case of *Benjamin Flower*, printer and publisher of the "Cambridge Intelligencer," 8 Durnford and East, p. 314,—and in that of *Sir Francis Eurdett*, reported in the 14th vol. of East's Reports.

tempt by libel, came to be adopted by both houses, and now stands supported by a long usage, recognized by the courts of the kingdom. It rests then, in England, upon the same basis as the powers and the privileges of those bodies, to wit, immemorial usage, and accordingly it is upon this footing that *Hargrave* puts it. Thus he says, "in respect also to both houses, their respective Journals contain evidence of a continual exercise of judicative power, in cases of privilege, for more than the last two centuries,"—and in no other part of these opinions does he offer any other ground for the exercise of this anomalous privilege.—We come now to the powers exercisable by either branch of the provincial legislature in relation to matters of contempt generally. The two branches of the provincial legislature are established by the 31st, Geo. III. c. 31, commonly called the constitutional act. They have no powers except those which they derive from that act, either directly or incidentally. They have never claimed or possessed any judicative power, other than that relating to matters of contempt, and it is as to the limits of this power that we are now called upon to inquire. The words of the act are as follows:—"That the legislative council and assembly, by and with the advice and consent of his majesty shall have power to make laws for the peace, welfare and good government of the province." It will not be said that the power claimed is given to them directly; they have not, as claimed by the parliament of Great Britain, any *inherent* powers.—They have no immemorial usage to sanction such a pretension. Whatever powers they possess in relation to matters of contempt can

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only be had by them as incidental to the powers given to them by the statute, founded on the well known rule of law, *cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit*. No doubt can be entertained that, as incidental to the powers given to those bodies by the statute, they have the power of committing for any actual obstruction of their proceedings, but this does not extend to the case of libel. Mr. Hargrave seems to have had this distinction present to his mind in the following passages : “ But though I take a judicative power in cases of privilege to be thus fully established *by long use* in both houses of parliament in England, yet as to the extent of such power, and as to the manner of exerting it, there are difficulties, which might perplex the most conversant in parliamentary law and precedents. So far as this jurisdiction applies to direct and positive infringements of the privilege of parliament, such as hindering or interrupting the two houses or their members or assistants in their functions, whether by arrests, assaults or otherwise, I cannot see the least room for doubting. So far also as this judicative power is applied to the writing, speaking or publishing of gross reflections upon the whole parliament, or upon either house, such an extension, *though perhaps originally questionable*, seems now of too long a standing and of too much frequency in the practice to be well controverted ; and I am struck in the same way in respect to other instances of extraordinary latitude, to which both houses have sometimes stretched their doctrine of contempts.”


And again—“ Upon this review of the course of proceedings for contempts against the lords or com-

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mons, it might perhaps be expected, *that so anomalous a mode of administering* criminal justice should not be extended *beyond the demands of the urgency whence it originates*. But the practice, which hath frequently prevailed in both houses, is not quite consonant to such an expectation. In point of fact, the proceeding has not always been confined to cases of *actual interruption* of the two houses and their members in the exercise of their functions. On the contrary, both houses have occasionally taken cognizance of libels upon the whole body, and of libels upon individual members, and sometimes even of libels upon the king's family and servants ; and under that latitude of construction have tried and punished offences, over which there could be no doubt of the competency of the ordinary courts of justice to exercise a jurisdiction. Nor, as to themselves, have the two houses always confined the proceeding for contempt to libellous publications reflecting upon their exercise of their legislative or judicial powers, or upon the conduct of individual members in that respect. Sometimes, indeed, these extended constructions of contempt have been loudly complained of, particularly where the lords, not content with committing for the offence, in which case the imprisonment of course terminates with the session of parliament, have gone the length of fining and of imprisoning for a term certain."

The privilege in England having been established in troubled times, the courts of justice seem to have been afraid to risk the consequences which might have followed from a collision between the high courts of judicature and the legislature, and as they treated a denial of their privileges as itself a breach of privi-

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lege, the situation of private advocates, even when called upon to give professional advice or assistance, might, where considerable public excitement existed, be somewhat delicate. Some traces of this would probably be found in the following passage from Hargrave: "What is the boundary of the jurisdiction to lords or commons as to privilege and contempt, and how that jurisdiction where it really exists is exercisable, very much depends *on the law and custom of parliament*. Of that law and that custom, the judges have sometimes declined to be the interpreters, even when called upon by the lords, with whom they are assessors. I feel, therefore, that it might be deemed unbecoming, and in other respects might be hazardous in me, professionally to avow more than *doubts upon the law and custom of parliament, against that, which both lords and commons so often heretofore, and the lords so recently, have decided by their own conduct.*" True lord Ellenborough, in the case of Sir Francis Burdett, considered the power of attaching for contempt by libel, as inherent in the two branches of the British legislature, and he seems also to have considered such a power as essential to their protection. This case it is conceived is the only case wherein this doctrine is countenanced. With all possible deference to the authority of that case, it does appear that that position might perhaps be questionable even in England, but there is no reason whatever to extend such a principle to a colonial legislature. In a state of society such as that of Great Britain, it is necessary that every branch of the public authority should be armed with higher powers than is required in countries circumstanced as these new countries are. So too, having founded the pri-

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vilege upon immemorial usage, the question as to its exact nature, origin and grounds theoretically, comes to be rather a subject of speculative enquiry than of practical utility. So too the opinion there must be taken *pro subjecta materia*, and it must not be lost sight of, that Sir Francis Burdett was a member of the house of commons when the offence complained of, was committed; and as well the house of commons as the house of lords possess a power of discipline *in foro domestico*. How far that power was abused upon the occasion of Sir Francis Burdett, we are not called upon to investigate. We are then at full liberty here to examine the grounds upon which such a power could be maintained, as incidental to the powers directly given by the statute. In entering into this enquiry it is proper that I should make this preliminary observation; that inasmuch as the grounds and reasons upon which the legislative council proceeded in declaring the applicant guilty of publishing a libel, are not examinable before this court, it would be travelling out of the record, to enter into the question of libel or no libel.— This is mentioned lest silence on this head might be misunderstood as implying any admission of culpability in the party before the court. That question does not here arise. The ground of complaint is that that question has not been brought before the proper tribunal, “a jury of the country,” the benefit of which form of trial has been denied. Libel against private individuals, and libel against public bodies, stand upon totally different grounds; the first cannot be too severely repressed; as to the last, care must be taken not to allow to be impaired the public discussion of the public conduct of public bodies. This is essential for

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the protection of the public liberty : majorities of all public bodies will occasionally, under certain influences of the moment, do acts of injustice which no one individual of that majority would himself do. The individual responsibility is lost in the crowd : the individual members of the body calumniated, if one will by the agency of the press, suffer not the pain, inconvenience and injury which a private individual would, under similar circumstances, suffer. The legal entity of the whole body is impassible, whether it assails or is assailed,—as no one who suffers from it can touch it, so ought it not to have the power of punishing those who animadvert upon its proceedings, by constituting themselves a court of justice, to judge the examiners of their public conduct. If you take away the power of this full examination, you destroy the action of public opinion, which cannot be brought to bear too strongly upon the proceedings of public bodies; and this power of full examination is taken away, if the public body whose conduct is to be examined, have the power themselves to assign the limits of that examination, and to punish those whom they declare to trespass beyond those limits. So too, where the aspersions are unfounded, their effects must be short-lived, and must themselves soon fall back on the calumniator. Again, the body calumniated or alleged to be so, cannot exercise judicial power with impartiality and competent discretion. In those cases wherein the public opinion is not a sufficient protection for the body accused, or where, from the peculiarly aggravated character of the offence, the offender may be thought liable to condign punishment ; his case may safely be left to a jury of his country, in the ordinary forms of

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judicial trial. No public body was ever injured by the public press. That power, so far as public bodies are concerned, might be compared to steam, which, with a proper use of safety-valves might be made subservient to the best purposes, and only produces explosion and death by being unduly compressed. Now all the powers which can be claimed as incidental to the main power given, are such only as are of necessity, without which the main and direct power given, could not be effectually exercised. The press, except where it touches private character, carries along with it the antidote of any poison which it may distil.

[KERR, *Justice*. here read a passage from Doctor Johnson's *Life of Milton*, wherein he says, "The danger of such unbounded liberty, and the danger of bounding it, have produced a problem in the science of government, which human understanding seems hitherto unable to solve. If nothing may be published but what civil authority shall have previously approved, power must always be the standard of truth; if every dreamer of innovations may propagate his projects, there can be no settlement; if every murderer at government may diffuse discontent, there can be no peace; and if every sceptic in theology may teach his follies, there can be no religion."]

It is not surprising that such a doctrine should come from Doctor Johnson. Milton himself stated a very different one, and one much more consonant to the truth. It is to be found in the prose works of that distinguished poet. I cannot pretend to give the words of the original, but the opinion which he there states, in substance is, that if the powers of truth and falsehood

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were to go forth and grapple on the same arena, no man need fear as to the triumph of the former. The whole burthen then lies upon him who would support the conviction in question, to shew that a public legislative body cannot fully exercise its legislative functions, if it be subjected to libellous attacks in print, and that these constitute such an actual obstruction to their proceedings as to prevent them from discharging their legislative duties. Neither branch of the provincial legislature requires this species of protection. It would not be contended that individuals animadverting upon the public conduct of public bodies, and doing so truly, ought to be punished: and where the aspersions are false and unfounded they might safely be left to the good sense of the community. Generally, the legislative and judicial functions ought to be kept apart. These powers are entirely distinct and separate in their nature, there is no point of natural relationship between them. If they are made to run side by side, they will not, like the two fabled rivers of antiquity, pursue their steady course without mixing; and, salutary as they are by themselves, when they do mix, their waters become the waters of bitterness.

If in any instance a judicial power, except for state offences on impeachment, could be rightly conferred upon a legislative body, the power in question is the last which should be granted. The essence of the offence for libel lies in the intention. The overt acts which are to constitute this offence cannot be strictly defined. It has been assimilated and rightly so in this particular to the offence of nuisance, the overt acts constituting which offence are equally undefinable. Wherever the question comes to be a question of in-

tention it is of the last degree of consequence that the persons called upon to judge of such intention should be free from all bias of passion,—of feeling even. Where the overt acts constituting the offence are clearly defined by the law, there a man of honor and truth may judge rightly respecting the evidence establishing the offence even though the accused should be his greatest enemy. Not so where the offence is undefined and undefinable, resting entirely in intention. His wounded self-love and the natural indignation arising from a supposed insult are but bad assessors with him in the judgment seat. Again, supposing him to be able to surmount these influences, will the public be satisfied with the sincerity of his judgment? It is feared not; and where this is the case, one of the capital advantages of the institutions for the administration of justice in criminal matters is lost, the confidence of the public impaired and the tranquillity of society jeopardised. Where this has existed the rudest forms of criminal codes, as in the case of the trial by ordeal and by battle, have been sufficient to maintain a tolerable order of things. The passages already given from Hargrave let us sufficiently into his sentiments as to the propriety of such a power being vested in a deliberative body. He could not, and ought not to have got over the *ita lex scripta est*, proved by the immemorial possession of them by the house of commons and house of lords. If this had been a case of the first impression there, not so supported, we can entertain little doubt what decision would be come to in the present day. *Junius*, in his 44th number, attacks this practice, and although the power of committing for libels cannot be denied to the

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house of commons, yet it is a power which has been but rarely exercised by that body for many years past, the commons having adopted the constitutional course of directing the Attorney General to prosecute for all public offences. And is it at this time and under these circumstances that broken columns of remote and rude antiquity are dug up from the ruins of feudal times, and are transferred as ornaments to the vestibule of the legislative council chamber? In conclusion, the court will recollect that ours is a written constitution and has not grown up as that of the British island, during a long period of time, gradually adapting itself to the new emergencies arising from the changes in the social condition of the people and bringing down with much pure gold and with an inextinguishable vitality some of the rubbish of a rude age. And the liberty of free discussion of the public conduct of public bodies is in the present state of things irrepressible and carrying along with it some slight inconveniences, incident to every thing that is human, a large quantity of positive good purifying, by enlightening, public opinion.

The court took time to consider its judgment, which was pronounced on Monday the 18th of February, the justices delivering their opinions *seriatim*, as follows :

KERR, *Justice*. With every desire to give our judgment on the matters which have arisen out of the return to this writ of habeas corpus, we have considered it our duty to look into the authorities referred to by the defendants' counsel in his long and able argument. This and our many judicial avocations during this term have prevented us hitherto from delivering our opinion on the constitutional question

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involving the cause of civil liberty, which has been presented to us for our determination. The main question is, whether the legislative council, being a type and similitude of the house of lords, has a right to commit, as for breach of privilege, in cases of libel? or, in other words, whether the principle on which the imperial parliament rests its rights, powers and privileges can be admitted to apply to the two branches of the provincial legislature? In regard to the two branches of the imperial parliament there can be no doubt that the privileges which they now enjoy, and the functions they exercise, were claimed, enjoyed and exercised by them previously to the separation of the two houses, so early as the close of the reign of Henry III. Their rights and privileges appear to be self-created, and absolute, founded on precedents and immemorial usage; nor is the exercise of their power to commit for contempts limited to such as are perpetrated in the face of the two houses, but it extends to all acts committed, which in their view, are calculated in any way to impair their dignity or to restrain the free and independent exercise of their functions. Of this, innumerable precedents are to be found, from the case of *Thrasidas* in 1529, who was committed by the commons for a contempt in words against the dignity of the house, to that of *William Perry*, *Benjamin Flower* and *Sir Francis Burdett*, in our times, who were severally committed for breaches of privilege in the publication of libels. But it has been argued by the defendants' advocate that the legislative council has acquired no such power by immemorial custom and usage, and that the parliamentary charter of the year 1791 confers no such authority upon it. I cer-

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tainly admit that this body does not possess, like the house of lords, a right to fine, or imprison beyond the session, nor so extensive privileges as the house of lords and commons possess. But can the exercise of the power of proceeding summarily and committing for a libel against the legislative council, as an aggregate body, be refused to them, without their sinking into utter contempt and inefficiency? A passage from the Pandects has been cited, which I feel myself bound to adopt on this occasion: "*Cui jurisdictio data est, ea quoque commissa videntur, sine quibus jurisdictio explicari non potest.*" The legislative council has no judicial powers conferred on it, it is a branch of the legislative government, entrusted with the authority to make "laws for the peace, welfare, and good government of the province." And whether a political institution is vested with the authority to make laws, or to explain and enforce them, it must of necessity possess all the powers requisite to ensure the purposes for which it was created. If the two bodies (for I speak both of the legislative council and assembly) had no authority to commit for written slander, calculated to expose them to public odium or derision, perhaps to intimidate them in the exercise of their important functions, there is no man can doubt but they might be impeded in the performance of the sacred duties which are confided to them, and become less efficient in their endeavours for the public good. It has been urged that the law is quite sufficient to protect them from insults and indignities of this nature, and that all which ought to be conceded to either house, is a right of punishing by imprisonment for insults, outrages, and interruptions committed in the

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face of the house. But I fear that the slow and tardy proceeding by indictment or information, and the uncertainty of the legal result, would little conduce to maintain the dignity of these bodies, or to protect them from the natural effects of contemptuous and defamatory libels. I am free to confess that this power of commitment for libel may be abused, but of two evils it is far better that this privilege should be confided to bodies selected by their sovereign and the people, for great and important purposes, than to leave them without those means of self-defence which are common to all courts of justice. Nor could we limit and define the cases within which such powers ought to be circumscribed without materially affecting and restraining the council in the free exercise of its functions. The counsel for the defendants appear to consider the privileges of both houses of parliament, of punishing for contempt, to be derived from the *Aula Regis* which exercised all the authority of a supreme court of justice; but the ecclesiastical and admiralty courts which do not derive their jurisdiction from the same source, exercise the same right of punishing summarily all contempts committed against their dignity and authority. (a)

It has been said that the proceedings taken against the applicant as set forth in the return, have been irregular and the return defective, and the precedent in the *King v. Perry*, has been referred to as illustrative of this position. I do admit that the return is wanting in that explicative precision which might be desirable. But considering this as a conviction by

(a) Clark's Prexis, tit. 52.

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the legislative council adjudging these defendants to be guilty of a breach of the privileges of that honourable house, I feel myself bound by the law which is laid down by Lord Chief Justice *de Grey*, (a) and since recognized as high authority, to pronounce that these proceedings are unexaminable here.

In giving this opinion on the question how far the legislative council and assembly may proceed to enquire summarily, and to commit during the session, for contempt, I cannot but feel that I have been somewhat influenced by the case of the *King v. Monk*, (b) which occurred here in the year 1817, and of the notice given in the journals of the assembly of the year 1818, of the predicament in which general Carmichael was placed, when commanding His Majesty's troops in Jamaica. But I beg it to be understood that I am not prepared to say that no case could occur, or be presented to us in any shape, of assumed privilege, in which this court might not feel itself bound to relieve the subject from a commitment. I am of opinion that the defendant must be remanded.

BOWEN, *Justice*.—By the return to this writ it is certified to us that the applicant, Daniel Tracey, stands committed to the common gaol of this district, upon a warrant of commitment, made by the legislative council of this province. From this commitment so returned, the party has applied to be discharged, principally upon the ground that neither the legislative council nor the assembly of this province have the right to convict for libel, and to commit the offender thereon as guilty of a breach of the privileges of the house, and

(a) 3 Wilson, 199.

(b) Supra p. 120.

that the offender can only be proceeded against by the ordinary course in the courts of law. Objections have likewise been made to the form of the proceedings returned to this court, as that it does not appear *by the commitment* that the party was brought in custody or had communication of the charge: that he was called on to make answer, or did answer, or that he was present when convicted and sentence pronounced,—these last being *purely technical*, will be best considered after the main question submitted to our consideration shall have been disposed of.

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It is not denied that in England both houses of parliament have frequently enforced the same rights which have been exercised by the legislative council in this instance, but it is said the houses of parliament in England derive their authority from long and immemorial usage, and claim it as an inherent right derived to them from the judicial authority formerly exercised by both branches of the legislature, as part of the *Aula Regis*. And it is contended that as the legislative council and the house of assembly of this province owe their origin to the constitutional act 81, Geo. III. cap. 81, they cannot legally exercise such power, having no inherent right to it. Unless, first, that it be expressly granted to them by that statute, or secondly, that it be "*necessarily incident*," to the correct discharge of the functions required of them by the act. It is however admitted that if the legislative council have the *power to convict*, which is denied; then the question of *libel* or *no libel* cannot be examined into by the court upon the return to the *habeas corpus*. This admission is perfectly correct, for not having the supposed libel and proceedings before

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us, nor the means of bringing them under our view, either by appeal or *certiorari*, we cannot know any thing of their contents. Looking at the act 31, Geo. III. cap. 31, we find that the Provincial legislature is empowered "to make laws for the peace, welfare and good government of the province." and in no part of this act is there any mention of what shall be the privileges of either branch of the provincial legislature, but it is certainly true that the framers of it intended to confer upon the provinces of Upper and Lower Canada, a constitution modeled, as far as circumstances would permit, precisely upon that of Great Britain.—It has been well observed by Sir *William Blackstone*, treating upon this very subject, "that the privileges of parliament are large and indefinite: that if all the privileges of parliament were once to be set down and *ascertained*, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and *under pretence thereof*, to harass any refractory member, and violate the freedom of parliament; the dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges *indefinite*." (a) *Chitty* in his notes upon this passage combats the doctrine, and the compilers of a more recent edition of the *Commentaries*, think with *Chitty*, that the privileges of parliament ought to be *defined*; though they add, "*it is difficult to do so where the same power that binds may loosen*. But a more intelligible and clear reason why the houses of parliament should have the power to punish libels on either house, and which is equally applicable to the colo-

(a) 1 Black. Comm. 164.

nial legislature, will be found in *Holt*, wherein he treats “ of libels against the two houses of parliament.” (a) “ The doctrine of contempts,” says the author, “ as it lies open to *natural* reason, and as it has been explained by all our soundest lawyers, may be laid in *one* principle : it is the self defence of a court, of its *moral* person and functions. The origin and necessity of it are intelligible in the mere statement. It is evident from the mere statement, that this privilege of punishing contempts answers to *self-defence* amongst individuals, being the defence of the dignity, body and functions of the court. Self-defence in an individual embraces three points, character, personal security and personal liberty. Now a *moral* person has the same properties, and therefore the same subjects of self-defence. The character of a *moral body* is its dignity, and the liberty and security of a moral body are the free exercise of its *political functions*, and the *free enjoyment* of its *political rights*. The first contempts, therefore, and the privileges which are founded upon them, are those which respect the character of the two houses of parliament, and hence it may be laid down as a general principle, that whatever grossly reflects on the character of a member of either house,—whatever imputes to him, what it would be a libel (b) to impute to an ordinary person, is a contempt and thereby breach of privilege—it is a direct assault upon his character, and through the *odium* presumed to be excited thereby, a *consequential obstruction* of his political duties. It has been demanded why privilege of parliament should interpose where the act is cognizable by common

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(a) Holt on libel, 117, cap. 8.

(b) Written imputations as affecting a member of parliament, may amount to a breach of privilege without perhaps being libels at common law.

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law? The common law has given a remedy, and more particularly in the case of libels and assaults,—where is the equity therefore, or where the necessity, that the same offence should be doubly punished, or that of two possible courses of proceeding, that should be chosen, which takes from the accused the forms of trial,—the security of a known law and a settled jurisdiction? To this it may be answered, that *it is not contrary* to any known rule of law, and certainly not to any maxim of *natural justice*, that there should be *two remedies* for the same evil,—and that where the parliament, as a court, and the law, have a concurrent jurisdiction, either, or both, should vindicate its right. It is not *two* punishments, and each of them *equal to the act* for the same offence, but two punishments for different parts of the offence; two satisfactions for two wounded interests. Parliament is injured in its privilege, the law in the public or private wrong.—Parliament *heal* their privilege, and the law takes compensation, for its own wrong. *Is it not thus in libels at common law?* The party has an action for the special damage to himself, and the King an indictment for the injury to the public peace. In all these cases, however, of concurrent jurisdiction, it is certainly an argument to the *prudence* and *discretion* of either house to consider whether the penal hand of the law be not sufficient, and whether that *necessity* in which the *anomalous* power of privilege is founded does not cease to exist where the law is at hand with its sword and its shield.” From the principles here stated it appears to follow as a *direct consequence*, an *incontrovertible truth*, that the right of the moral person, namely the legislative council, to convict and punish in a sum-

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many manner, persons guilty of a gross outrage or scandalous libel upon that body, must exist without having recourse to the ordinary modes of proceeding in the courts of law, which the legislative council could not effect by a civil action, because as a body no such action could be maintained—nor even by indictment in a court of criminal jurisdiction; first, because such indictment would depend upon the will of the crown,—and secondly, because the offence would be tried as a breach of the peace, and not as a violation of the privileges of the house; with this right then, they are vested as being *necessarily incident* to the free exercise of their political functions, abstracted from every consideration connected with judicial authority which that body is said generally not to possess. The privileges of parliament, like the prerogatives of the crown, are the rights and privileges of the people. The language of Lord *Ellenborough* in the case of *Burdett v. Abbot*, in 1811, is also strictly applicable to the case before us. “The privileges which belong to them (the houses of parliament,) seem at all times to have been, and *necessarily must be*, inherent in them, *independent of any precedent*: it was necessary that they should have the most *complete personal security*, to enable them to *meet freely* for the purpose of discharging their important functions, and also that they should have the right of *self protection*; I do not mean,” says that learned judge, “merely against acts of individual wrong; for poor and impotent, indeed, would be the privileges of parliament, if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual

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exercise of their parliamentary functions. *Independently* of any precedents or recognized *practice* on the subject, such a body must *a priori*, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On *this* ground it has been, I believe, very generally admitted in argument, that the house of commons must be, and is authorized to remove any *immediate* obstructions to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection ; it must also have the power of protecting itself from insult and indignity wherever offered, by punishing those who offer it. Can the high court of parliament, or either of the two houses of which it consists, be deemed not to possess, intrinsically, that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as belonging to every superior court of law, of less dignity undoubtedly than itself ? And is not the degradation and disparagement of the two houses of parliament in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, and in his endeavour to resort to the place where parliament is holden ? and would it consist with the dignity of such bodies, or what is more, with the immediate and effectual exercise of their important functions, that they *should wait* the comparatively tardy result of a prosecution in the ordinary course of law, for the vindication of their privileges from wrong and

insult." In the lords, on Tuesday the 12th April 1831, the Earl of *Limerick* called the attention of the house to a paragraph in the *Times* newspaper of the preceding Saturday, terming him "a thing with human pretensions, who did not blush to treat the mere proposal of establishing a fund for the relief of the distressed and helpless Irish, with brutal ridicule or almost impious scorn." After a debate in which Lord *Eldon* and others declared their approbation of such attacks being noticed by the house, the motion "that the printer of the *Times* be ordered to attend at the bar of this house to-morrow," was carried without a division. On the next day he appeared and was committed to custody with the usual vote. In the course of the debate Lord *Tenterden* said, "And why was this power conferred? it was conferred not for the protection of those who possessed it—not for the sake of the house of lords—not for the sake of the house of commons—not for the sake of the courts of law, all of whom were in equal possession of the power, (a) but for the sake of the nation at large, for whose welfare and well government it was absolutely necessary, that

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(a) A proposition for fining the printer failed, and the Lord Chancellor in a most eloquent speech, set Lord *Tenterden* right, and shewed that the *right to fine* did not exist in the commons. The following is an extract:—

"Good God! my lords, whoever heard till this moment—when were you ever told till this day, when you have been told it by a Lord Chief Justice of England, that the house of commons has a right to inflict *finer* and imprisonment upon his majesty's subjects in vindication of their privileges? No one who knows any thing of the law and constitution of the country can hesitate for a moment in saying that my Lord Chief Justice is grievously in error here, and until I am told by my noble friend in terms the most clear, and the most explicit, I will not believe that he is prepared to defend and justify in law what he has thus said; for he has thereby conferred upon the house of commons a power which none of his learned, none of his worst, none of his most corrupt, none of his least calm, his least temperate or his least respectable predecessors ever dreamt of arming the commons with."



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all men should be taught to pay due reverence to the great legislative council of the kingdom, and to those tribunals of justice in which the laws of the land were administered. It was for these reasons that the houses of parliament and the courts of law possessed this power ; it was for these reasons they ought to possess it, and *he was quite sure* that if they, and especially the *two* houses of parliament, did not possess this power of vindicating *themselves*, it would be impossible that their respective duties could be performed with dignity to themselves, or with advantage to the country." This again shews the privilege in question does not depend as has been argued in the present instance, upon the judicial authority vested in the body exercising the right of imprisonment for libel ; but upon the principle of self defence as much and as correctly applicable to the legislative council as a branch of the provincial legislature as it can *possibly* be to either branch of the parliament of Great Britain. Besides, by the conviction before us, the legislative council have done no more than the house of commons has invariably done upon similar occasions, imprisoned the offender during the session of the legislature, and in so doing have exercised a power which during a period of *nearly forty years*, has been frequently exercised by the assembly of this province, and more particularly in the recent case of *Monk*, who, on the 21st February 1817, was committed to the common gaol *during pleasure* by the assembly, for a contempt and violation of its privileges, and was subsequently discharged by the court on the 22nd of March, the same day on which the legislature was prorogued. That these privileges have likewise been acted upon

by other provincial legislatures, and have been recognized by the highest authority, may be seen by the Journals of the assembly of Jamaica, in 1808, in the case of Major General *Carmichael*, and by the Journals of the assembly of this province, in the case of *Monk*, in the year 1818, in which the cases are collected.

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With respect to the objections taken to the warrant of commitment in this case, it is a sufficient answer to say, that it does appear the party has been convicted for a breach of the privileges of the house committing him; the same *certainty* is not necessary in a *commitment*, which would be requisite to support a *conviction*. There is no necessity in the *commitment* to state that the party was brought before the house in custody, was made acquainted with the charge, was called upon to answer, was present when convicted and sentence pronounced: all *this must or ought to have preceded* the commitment, but the following authority is conclusive on that head:—See the case of *Rex v. Hawkins* (a) which is expressly recognized to be law, in *Rex v. Taylor*, (b) on which *Paley* (c) observes, “indeed it is a general rule that if a warrant of commitment in *execution, manifestly defective on the face of it*, shews that there has been a conviction; the court will not notice the defect until the *conviction* is returned into court, and *if* the conviction be right the defects in the commitment will be cured, provided the latter shews the like offence as is stated in the conviction.” Much more might be urged upon the present occasion, but it is unnecessary, coinciding as I

(a) Fort. 272.

(b) 7, D. & R. 3 M. C. 491.

convictions, note (c) p. 253.

(c) Paley on

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do in the judgment of the court, and being decidedly of opinion that we cannot afford the relief sought for, therefore let the prisoner be remanded.

TASCHEREAU, *Justice*. This question leads us to consider, 1. If each house of the imperial parliament has a right to imprison for libel against that body; 2. If this right of the imperial parliament extends to both houses of the provincial legislature; and 3. If courts of justice can take cognizance of this matter. It is unquestionable that the lords and commons have invariably exercised this right, and although it may have been questioned by some individuals, courts of justice have recognized it in all cases. The lords and commons, according to the enormity and tendency of the libel, have sometimes considered it as a contempt of their body, sometimes as a mere breach of their privileges, but in whatever light they may have considered it, they have uniformly exercised the right of punishing it. Examples without number, before and up to the time of the commonwealth, from the period of the re-establishment of the monarchy to the revolution in 1688, from that time to the end of the reign of William the third, and from the latter period to the latest reigns, attest that under all circumstances, either of revolution or political changes in which England may have been placed, the two houses of parliament have always enjoyed and exercised the right of imprisoning persons, whether members of their own body or not, for breach of their privileges, either arising from injurious language, or writings derogatory to the honor and character of the house, or any of its members, after having declared them guilty of a breach of their privileges. Whatever may have been the origin

of this right, whether it is derived from the *Aula Regis*, whose privileges parliament enjoyed when both houses were united, and which they respectively preserved when they became separated into two bodies; those precedents establish the parliamentary law on this point, as well as its utility and necessity for maintaining the dignity and independence of both houses; they also establish an acknowledgment of this right by the courts of justice and its analogy to their own powers. Although on certain occasions the house of commons may have thought it proper from circumstances of the moment, to have recourse to the ordinary tribunals, it has not thereby renounced the right of maintaining its privileges by its own authority, and the case of Sir *Francis Burdett* proves this fact. These bodies have always considered themselves as sole judges of contempts against themselves, and as guardians of their own privileges. In fine, it is a right coeval with the constitution, it is a right which may be truly said to be part of the fundamental law of parliament. Parliamentary law is a part of the law of the land, and part of this *lex terræ* is to be found in the great charter, wherein it is declared "that no freeman shall be imprisoned, unless in virtue of a judgment of his peers, or by the law of the land." This right so essential to the liberty of speech, to the independence of these bodies, and to the general safety of the state, as well as of these bodies themselves, must be considered as inherent in them. It is upon these principles that prosecutions instituted in courts of justice in order to contest these rights, have been dismissed, and that persons brought before them by *habeas corpus*, have been invariably remanded upon sight of the return to the

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writ, when it appeared they were committed by warrant of the speaker. This province enjoys a constitution similar to that of England, in virtue of a particular statute, it is true, to make laws for the welfare and good government of the province. Although the statutes mention only this power, it does not deprive the colonial legislature of their powers which are inherent and necessary to bodies constituted to perform their duties with liberty, independence and for the general good. Each body of the colonial legislature must have in itself the elements of its own preservation and possess those rights which are inherent to similar bodies, and without which it would be constantly exposed to contempt and destruction. Then where, to what country or body must it look to seek for its powers and protecting laws, if it is not to the bodies,—both houses of imperial parliament,—who have given the country a participation in a free, but strong and powerful constitution, capable of maintaining itself? If in England this power is recognized as inherent in the constitution, that is to say, as a parliamentary law necessary to the independence of their bodies, as a law of the country, it exists in this country. In granting us the constitution, Great Britain has given us the laws to protect it. Although the constitutional act maintains but certain particular duties, this does not deprive the colonial legislature of the other powers which are enjoyed by the other colonies, where constitutions are only established by charter; indeed the provincial legislature has performed other duties inherent in the imperial parliament, and the right of doing which cannot be denied to our provincial legislature, although not mentioned in the constitutional acts, and their

duties are also of high importance, and required power and independence of a constitutional character to fulfil them. These rights have been claimed and exercised in this country since the commencement of the constitution, and the same thing has obtained in other colonies, in Jamaica as well as elsewhere, and they have been sanctioned by the courts of justice of this country in the case of *Samuel Wentworth Monk*. It is true that this case was for a contempt of the house; but the constitutional act does not maintain the case of contempt more than it does that of a simple breach of privilege, and if the court considered that the house had a right to imprison *Samuel Wentworth Monk*, for a contempt, notwithstanding the silence of the constitutional act, on the same subject, by analogy, the courts cannot deny it the right of imprisoning for a breach of privilege by the publication of a libel, since this right of noticing and protecting its own privileges is as essential as the right of judging on contempts of its own body. This power must be considered in this country as in England, as the law of the land, and which could not be yielded without the concurrence of the three branches. The legislative council,—as well as the assembly,—being the sole judge of contempts against its own body, the guardian of its own privileges, it had jurisdiction in the present instance, and if it had jurisdiction, it being a body not inferior to other tribunals, we have not the power to revise its proceedings, we are not a court of appeal, from what it may have decided. We cannot take cognizance of its privileges, it belongs *ad aliud examen*. The *habeas corpus* act in England could not certainly give to one judge alone in chambers, or to a court the power of

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judging the privileges of the lords and commons, neither then can the *habeas corpus* act give us the right of judging the privileges of the legislative council or assembly. The Bill of Rights which forms part of the parliamentary law says that, "the liberty of speech and debate, or *proceedings in parliament* shall not be impeaded, nor be called in question by any court or other place out of parliament." This act or charter which, comparatively speaking, is not of ancient date, is but declaratory of these ancient and necessary rights and privileges of parliament. This act is as much in force in this province as in England. We granted the *habeas corpus*, not being aware of the exact nature of the commitment, but now that we see that it is in consequence of a judgment of the legislative council, respecting its privileges, and that the imprisonment is in execution of that judgment, we must stop, and cannot liberate the person imprisoned, nor admit him to bail. It is necessary to be observed that great confusion and disorder would follow, if we could upon a writ of *habeas corpus*, examine and determine upon contempts of higher courts. This power of committing flows from the primary principles of justice, for if the council has a right to decide, it has also the right to punish. It has been objected that, the power of either house to imprison for libel is contrary to the law, which leaves the decision of such cases to juries, and especially to Mr. Fox's act which leaves all, the fact of the publication as well as the question of libel, to the jury. But this act was never intended to annul the rights and privileges of parliament. It affects only those cases brought before a jury, and not those brought before parliament, and moreover the case of *Burdett*,

in which this question was decided after solemn argument, is long posterior to Mr. Fox's act, which is the 32d Geo. III. cap. 60. It has been also stated that the case of *Burdett* was one where the house had punished one of its own members. But in that case the court took not into consideration whether he was a member or not, it decided on the general question as to whether the commons could take cognizance of a libel published against its own body, and punish the author. It has been farther objected that the prisoners have been condemned without being heard in their defence. But the answer to this is to be found in the commitment. It appears by the commitment that they have been found guilty of a breach of privilege. This supposes that they have been previously heard. We have nothing to say on the mode of proceeding in parliament, they have their system as we have ours; they have jurisdiction and that is sufficient to stop us from going any further. For these reasons, and those given by the other learned judges, I am of opinion that we cannot liberate the prisoner on the present occasion, and he must be remanded.

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The same order was entered in the case of *Ludger Duvernay*, brought before the court by another writ of *habeas corpus*, upon a conviction by the legislative council on the 17th January 1832, for a similar breach of privilege in publishing in the paper intituled "*La Minerve*," on Monday the 9th January 1832, a libel upon the legislative council.



## COLDSTREAM, HALL.

21st July,  
1832.

In an action against the captain of a ship chartered by the E. I. C. for an assault and false imprisonment, — a justification on the ground of mutinous, disobedient and disorderly behaviour sustained.

**T**HIS was a suit brought by *William Warr*, seaman, against the Captain and first officer of the ship *Coldstream*, chartered by the *East India* company, to recover compensation in damages for an assault and false imprisonment, alleged to have been inflicted on the voyage from *China* to the port of *Quebec*. The summary petition, besides a prayer to award £200 damages, concluded for the payment of the promovent's wages, and a rescision of the articles, so far as respected him, on the ground of ill treatment. The defendants, by their responsive allegation, justified on the plea of mutinous, disobedient and disorderly behaviour.

**JUDGE KERR.**—There has been laid before the court, as is not unusual in suits similar to this, much contradictory evidence; but the circumstances, as they appear to me, are the following:—On the night of the 25th May last, when the *Coldstream* was near the banks of *Newfoundland*, she experienced a strong gale of wind, and all hands were ordered to take in the foresail; when the gear was sufficiently up for furling, and every thing prepared, the men were sent up on the yard to furl the sail. When they were upon the yard, *Warr*, who was aloft, called out that if the ship were not kept away before the wind they could not furl the sail.—*Taylor*, who had then assumed the command on deck, observed that there was a sufficient number of men on the yard to furl the sail in the hardest gale of wind

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that ever blew, and refused to keep the ship away. Perceiving the men meditated coming down without obeying his orders, he called out to them, "let me see the man that lays down before the sail is furled." On this *Warr* was heard to address his companions on the yard, "let us all go down together in a body and see what he will do with us." This seems to have had its effect, and *Warr* and *Walsh* taking the lead, the men all came down upon deck. At this time the captain, on coming from his cabin, sharply remonstrated with the men for their conduct, and accused *Warr* of being their ringleader; he shook his clenched hand in the captain's face, telling him that he was no gentleman, and the most scandalous captain that he ever sailed with. It also appears, that on *Holbrook*, the second officer, interfering and desiring him to desist, he called him a liar and a half-drilled soldier, and said that the rest of the officers were no better. After much more abusive language both to the captain and his officers, *Warr* was by the captain's orders placed in irons.— This happened early in the morning of 26th May, and on the same day a court of enquiry being assembled in the cuddy, and the officers being of opinion that it became absolutely necessary for the maintenance of subordination and discipline of the ship, that *Warr* should be punished, he was accordingly condemned to receive three dozen of lashes at the gangway. In the necessity of this punishment Mr. *Harrison*, the surgeon, concurred, though he states that being only connected with the health of the ship he had no vote on the occasion. It further appears that the boatswain's mate, whose duty it is to inflict such punishment, whether from sympathy towards his messmate,

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or from unskilfulness in the use of the instrument, only exhibited a mockery of punishment, and as Mr. *Harrison* states, "dropped the cats upon his back," and on this the captain desired *Taylor* to complete the punishment, which was done accordingly. This is the case, as disclosed in the evidence, though it has been attempted on the part of the promovent to give a coloring to the transaction which does not belong to it. It has been said that the punishment was inflicted with great severity,—even with cruelty,—insomuch that the blood streamed from the back, and that the blows were not inflicted between the shoulders, as usual, but on the neck, side and loins, and as represented by *Goddard*, who admits he himself had been flogged, that *Warr's* back was, from the severity of punishment, like a jelly; but this is contradicted by the surgeon, who says that no blood was drawn, nor was the skin broken, and that in his opinion, *Warr* was able to do his duty the same day. In these facts he is confirmed by Mr. *Holbrook*, and by *Dyer* and *Davenport*. It has been represented that when *Warr* was brought on deck to be punished, the captain seized him rudely by the lips, and that previously to his being flogged, no intimation was given to the crew as to the cause of his punishment. On both points, however, the promovent's witnesses are contradicted. On the second, by *Scott*, the promovent's witness, and by Mr. *Solby*, the third officer; and on the first point the fact is explained away by many of the defendant's witnesses, who swear that when *Warr* was brought to the gangway his language was so abusive and seditious, that the captain only put his hand on his mouth to prevent the continuation of it.

The promovent's advocates have relied on the testi-

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mony of some of the crew, who swear that the behaviour of *Warr* was always respectful and obedient, and particularly on that of *Goddard*, the boatswain's mate, who is pleased to say, that *Warr* is a civil, honest, and quiet man, and that he never uttered a bad word. But how is this to be reconciled with the evidence of *Walsh*,—who appears throughout this matter to have been a co-ringleader,—for he swears that when the captain said several abusive words to *Warr*, he made a reply to some of them, and that he persisted in speaking until he was threatened to be gagged. *Walsh* does not mention the promovent's words, but other witnesses supply the deficiency; for, *Dyer*, the sailmaker, says, that when the captain desired him to hold his peace, he told him that he had spoken in the company of gentlemen, where he, the captain durst not shew his face, and that he, had been flogged in a better ship, and by a better man, and by his, captain *Hall's*, master. That during this time, to use the witness's own expression, *Warr* "bobbed his head in the captain's face." He further says, that though he had been eleven years at sea, he never saw a captain so insulted; to the same effect, is the testimony of *Davenport*, the carpenter, who says that *Warr's* conduct was mutinous, desperate and outrageous. That when he was brought up to be flogged his tone and manner were unruly and disrespectful, and that though he, the witness, had been ten years at sea he never saw such unruly conduct. So says *Solby*, the third officer, who states that *Warr* insultingly said to the captain, "I have spoken to your masters on his majesty's quarter deck." And that on all occasions of dissatisfaction among the men *Warr* was always the spokesman. In this they are

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corroborated by *Comyn* and *Sewell*, the midshipmen, the first of whom says that the captain repeatedly told *Warr* to hold his tongue, which he refused to do, insisting to speak, and at the same time pushing his head, to use his words, in the captain's face ; that he never addressed the captain by the word, " Sir," and that his gestures and deportment were so menacing that he appeared to the witness to have thereby intended to provoke the captain to some act of violence.

The counsel for the promovent have called in question the right of the master under any circumstances of misbehaviour to inflict so public an act of castigation on a seaman ; but the cases of the *Agincourt* and *Lowther Castle*, (a) and that of the *Inglis* East India man, to which my attention has been called, clearly establish the right to punish in the mode proved to have been practised on this occasion, the master thereby assuming on himself the responsibility which belongs to the punishment, being necessary, for the due maintenance of subordination and discipline, and that it was applied with becoming moderation. The same maritime principle has been adopted by a neighbouring commercial and enlightened nation, justly boasting of the freedom of its laws and institutions. Indeed, it is an arbitrary power which dire necessity sanctions, and the execution of which necessity and moderation alone can justify. On the whole I have no hesitation in saying that this individual, by his influence on the minds of the crew, led them to an act of disobedience and mutiny. The mutiny, it is true,

(a) 1 Haggard's Adm. R. 271. 364.

was not carried so far as to lay violent hands on their commanding officer, or to put him into confinement ; or to carry away the ship ; yet, considering that *Warr* excited the men to come down from the yard in a body in disobedience to the orders of the captain ; that on the captain's saying he would shoot the first man who came down on deck, *Warr*, scoffingly said, " and pray who will shoot the second ?" I cannot, coupled with the whole of his language and behaviour, but consider him as a mover of sedition, having a direct tendency to subvert the good order and discipline of the ship. His punishment of course became absolutely necessary for the preservation of the whole concern. I am also of opinion that it was in no degree excessive under the circumstances which called for it. The conduct of the captain is admitted by all the witnesses, excepting on this occasion, and that even by *Walsh*, to have been mild and humane, and his going down to visit *Warr*, when in irons, and saying to him, "*Warr*, I never confine a man without seeing that he has a convenient place to lay down upon," is to me a convincing proof of his reluctance to punish this individual, and a desire to forgive him if he had shewed the least contrition for his conduct.

In respect to the other defendant, it must be recollected, that he was the first officer of the *Coldstream*, which had a crew of about sixty men, and that on him devolved the active duties of the ship, and the enforcing of all lawful commands. Such a person must often incur the odium of the crew, and I am not surprised that his character should be represented as arbitrary, and his orders unreasonable ; however, it is not for the crew to pass judgment on their superior

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officer, and to rise up against his authority. Nor am I at all inclined to believe, contrary to the weight and respectability of the witnesses in his favor, that he was in a state of intoxication on the night of the 25th of May, or that such is the habit of his life. I have patiently gone through the evidence on both sides, and the result is that I decree this suit to be dismissed and condemn the promovent to pay expenses.

*Ussher and Aylwin*, for the promovent.—*Black* for the respondents.

OLIVA *against* BOISSONNAULT.

20th Octr.  
1832.

Navigable rivers have always been regarded as public highways, and dependencies of the public domain; and floatable rivers are regarded in the same light.—In both the public have a legal servitude for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude.

THIS was an action of damages by the plaintiff against the defendant, for obstructing the river *St. Thomas* by booms and otherwise, and thereby stopping certain logs of timber in their descent towards the *St. Lawrence* from the land of the plaintiff,—which lies on the same river *St. Thomas*, above that of the defendant,—and thus interrupting the free passage of the river. The defendant averred *that the river St. Thomas was not a navigable river*, and that the plaintiff and others had therefore no legal right to use the waters of that river for floating logs to the *St. Lawrence*, or other similar purposes.

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SEWELL, CH. J. It may, I think, be received as a general principle, that the public have a right to all the advantages, suited to public purposes, which the natural state of a river affords, and that no change can be effected in the state and condition of a river, which does afford such advantages, unless some greater degree of convenience is thereby obtained for the public (a) Where there is a small stream of running water,—*cours d'eau*,—the owners of the land over which it flows, have certainly a right to make use of so much of it as is necessary for their convenience, during its passage. But even in such streams, the law carefully protects the rights of all who may be benefited by the water which flows in them. The quantity of water in such cases is in fact so small, that it can only be applied to the ordinary purposes of life. But whoever does so apply it, is bound to do it in a manner which is not inconsistent with the rights of other owners of lands over which the stream naturally flows. A partial diminution of its quantity, if reasonable and necessary, is permitted; but he who avails himself of this permission, in the exercise of his right, must not injure or annoy his neighbour, by causing it to flow back upon his land, nor will the law allow him to direct the water from its course, or to detain it unreasonably. “Si le “propriétaire d’un héritage,” says *Toullier*, (b) “qui “traverse un courant d’eau, pouvait détourner ce courant, ou en retenir toutes les eaux au préjudice du “fonds inférieur, le propriétaire supérieur aurait le “même droit. La loi donc s’y oppose par un motif d’équité; et en défendant à l’un et à l’autre de détourner

(a) 2 Starkie. The case of Lord Grosvenor. (b) 3 Toullier, p. 90.



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“ le cours de l'eau, protège également leurs propriétés  
 “ par la limitation même qu'elle y apporte. Ils peuvent  
 “ user de l'eau pendant qu'elle traverse leur héritage,  
 “ l'y faire circuler comme bon leur semble, mais à la  
 “ charge de la rendre, à la sortie de leurs fonds, à son  
 “ cours ordinaire.” (a) The maxim therefore, “ *sic  
 utere tuo ut alienum non lædas*,” applies in its full  
 force to the enjoyment of brooks and rivulets *by indi-  
 viduals*, and *a fortiori* must be equally applicable to  
 the enjoyment of rivers, in which the volume of water  
 is so great, as not only to benefit individuals, but to  
 afford additional advantages, which benefit the public  
 at large. Accordingly, in the law of France, naviga-  
 ble rivers have always been regarded as public high-  
 ways and as such dependencies of the public do-  
 main ; (b) and floatable rivers (rivières flottables, as  
 they are there termed) have been viewed in the same  
 light. (c) In every river which is navigable for boats  
 or larger vessels, and in every river which is floatable,  
 that is to say, capable of floating logs or rafts, (d) the  
 public as in England (e) and in America, (f) have an  
 easement or legal servitude, viz. a right of passage as  
 in a public highway, and consequently the proprietors  
 of the adjoining banks, be they who they may, can  
 neither use the bed or the water of such rivers, (in  
 what regards the public) in any way which is incon-  
 sistent with the easement to which the public are so

(a) 2 Henry's, p. 999 to 1002.

(b) 1 Fevre de la Planche, p. 15.

(c) Ordonnances des Eaux, &c. tit. 27. de la Police, &c. des Eaux, arts. 44. 45. and 46.

Pandectes Française, vol. 5. p. 108. Kent's Com. vol. 3. p. 342. Toul-  
 lier, vol. 3. p. 99, No. 145.

(d) L. C. Denizart, vol. 9, “ Flottage.”

(e) Hale de jure maris, Pars prima, cap. 3. p. 309. (f) 3 Kent's Com.  
 344.

entitled. (a) The evidence in this case may not be sufficient to shew that the river Saint Thomas is a “*rivière navigable*.” But the fact that the logs floated down the stream from the plaintiff’s land to the defendant’s, and were there stopped in their progress towards the Saint Lawrence by the boom which the latter has constructed, proves it to be a “*rivière flottable*,” and judgment therefore must be entered up for the plaintiff.

Let it be referred to experts to report the quantum of the damages which the plaintiff has sustained.

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AUSTIN CUVILLIER.....*Appellant.*  
and  
OBADIAH AYLWIN.....*Respondent.*

29th Novr.  
1832.

THE Act of Parliament, 31 Geo. III. cap. 31, commonly called the Canada Act, enacts, (b) that there shall be a legislative council and house of assembly in each

An act of the parliament of Great Britain declared, that all laws passed by the

legislature of a colony should be valid and binding within the colony, and directed that the colonial court of appeal should be subjected to such appeal as it was previously to the passing of the act, and also to such further and other provisions as might be made in that behalf by any act of the colonial legislature: Held, that an act having been passed by the colonial legislature, limiting the right of appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King in council, although there was a special saving in the colonial act of the rights and prerogatives of the crown.

(a) See the Royal Declaration of January 1663, in Bacquet, vol. 1. p. 457.

(b) S. 2.

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of the provinces of Upper and Lower Canada, and that "in each of the said provinces respectively, His Majesty, his heirs or successors, shall have power, during the continuance of this act, by and with the advice and consent of the legislative council and assembly of such provinces respectively, to make laws for the peace, welfare and good government thereof, such laws not being repugnant to this act; and that all such laws, being passed by the legislative council and assembly of either of the said provinces respectively, and assented to by His Majesty, his heirs or successors, or assented to in His Majesty's name, by such person as His Majesty, his heirs or successors, shall from time to time appoint to be the governor, or lieutenant governor of such province, or by such person as His Majesty, his heirs or successors, shall from time to time appoint to administer the government within the same, shall be, and the same are hereby declared to be, by virtue of and under the authority of this act, valid and binding to all intents and purposes whatever, within the province in which the same shall have been so passed." There is also a provision in this act for the transmission, by the governor, lieutenant governor, or other person administering the government, by the first convenient opportunity, of all bills which have been passed by the legislative council and assembly, and assented to by him in His Majesty's name, to one of the principal secretaries of state; and also power reserved to the King of disallowing any such bill within two years (*a*) after it has been received by the Secre-

(*a*) The greater part of the colonial statutes receive no express confirmation by the King, and are held to be valid without it. Those only are

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tary of state (a) The 34th section also directs, " that  
 " the governor or lieutenant governor, or person ad-  
 " ministering the government of each of the said pro-  
 " vinces respectively, together with such executive  
 " council as shall be appointed by His Majesty for  
 " the affairs of such province, shall be a court of civil  
 " jurisdiction within each of the said provinces res-  
 " pectively, for hearing and determining appeals within  
 " the same, in the like cases, and in like manner and  
 " form, and subject to such appeal therefrom, as such  
 " appeals might before the passing of this act have  
 " been heard and determined by the governor and  
 " council of the province of Quebec; but subject,  
 " nevertheless, to such further or other provisions as  
 " may be made in this behalf by any act of the legis-  
 " lative council and assembly of either of the said  
 " provinces respectively, assented to by His Majesty,  
 " his heirs or successors."

The legislative council and assembly of Lower Ca-  
 nada passed an act in the 34th year of King Geo. the  
 III. commonly called the judicature act, which was as-  
 sented to by the governor for the time being, transmit-  
 ted by him to the Secretary of state, for His Majesty's  
 approval, and was not disallowed by him. The 30th  
 section of this judicature act enacts, " that the judg-  
 " ment of the court of appeals shall be final in all cases,  
 " where the matter in dispute shall not exceed the

confirmed which relate to measures of general and peculiar importance, or in-  
 terest, or contain a clause suspending their operation until the King's pleasure  
 is known, the latter of which, if not confirmed within three years from their  
 passing, are considered as disallowed, by the provisions of an order of  
 council of the 6th of January 1806. Both the confirmation and disallow-  
 ance of colonial statutes are subjects of a special order by the King in  
 council. See report on Barbadoes by the Commissioners for enquiring into  
 the administration of civil and criminal justice in the West Indies, p. 9.

(a) Sec. 31.

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“ sum or value of £500 sterling ; but in cases exceed-  
“ ing that sum or value, as well as in all cases where  
“ the matter in question shall relate to any fee of office,  
“ duty, rent, revenue, or any sum or sums of money  
“ payable to His Majesty, titles to lands or tenements,  
“ annual rents, or such like matters or things, where  
“ the rights in future may be bound, an appeal shall be  
“ to His Majesty in His privy council, though the im-  
“ mediate sum or value appealed for be less than £500  
“ sterling, provided security be first duly given by the  
“ appellant, that he will effectually prosecute his ap-  
“ peal and answer the condemnation, and also pay  
“ such costs and damages as shall be awarded by His  
“ Majesty in his privy council, in case the judgment  
“ of the said court of appeals of this province be af-  
“ firmed ; or provided that the appellant agrees and  
“ declares in writing, at the clerk’s office of the court  
“ appealed from, that he does not object to the judg-  
“ ment against him being carried into effect according  
“ to law, on which condition he shall give sureties for  
“ the costs of appeal only, in case the appeal is dis-  
“ missed ; and on condition, also, that the appellees  
“ shall not be obliged to render and return to the  
“ appellant more than the net proceeds of the execu-  
“ tion, with legal interest on the sum recovered, or  
“ the restitution of the real property, and of the net  
“ value of the produce and revenues of the real proper-  
“ ty, whereof the appellee has been put in possession  
“ by virtue of the execution ; to take place from the  
“ day he recovered the sum, or possessed the real pro-  
“ perty, until perfect restitution is made, but without  
“ any damage against the appellee by reason of such  
“ execution, in case that the judgment be reversed,

“ any law, custom, or usage to the contrary notwithstanding.” In the 43d section of this act there is a proviso, “ that nothing therein contained shall be construed in any manner to derogate from the rights of the Crown, to erect, constitute and appoint courts of civil or criminal jurisdiction within this province, and to appoint from time to time the judges and officers thereof, as His Majesty, his heirs or successors shall think necessary or proper for the circumstances of this province, or to derogate from any other right or prerogative of the Crown whatsoever.”

The respondent in this case had obtained a judgment of the court of appeals for Lower Canada, dated the 20th of November 1816, (reversing a previous one of the court of King’s Bench for Montreal,) for the sum of £397. 14s. 7d. currency, and costs, and sued out execution upon it. The appellant then filed a writ of “ opposition to the execution (somewhat resembling the *auditâ querelâ*(a) and put in pleadings, called “ *Moyens d’opposition*,” in support of it. To these pleadings the respondent put in an answer, issue was joined thereon, and the court of King’s Bench at Montreal ultimately granted *mainlevée* on the execution, which it declared to have been illegally obtained. The respondent then appealed to the court of appeals, and that tribunal, by a judgment dated the 30th July 1821, reversed the judgment of the Court of King’s Bench.

In July 1823, the appellant presented a petition to the King in council, for leave to appeal from both the judgments of the court of appeals, of the 20th of No-

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(a) See Pothier, *Traité de la Procédure Civile*, partie 4, cap. 2nde. art 6

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vember 1816 and the 30th of July 1821; and on the 23d June 1824, he obtained an order of Council, that he should be permitted to do so, without prejudice to the question, whether the appeal was competent or not, upon giving security in the sum of £100 to prosecute the appeal within a year and a day from the date of the order, and to stand the determination, in case the appeal should be dismissed. In December 1826, the respondent presented his petition to the King in council, that the appellant's petition should be dismissed with costs. This petition was heard before the committee for hearing plantation appeals, on the 30th of January and 2d February 1827, when their lordships ordered that cases should be printed on both sides, confined to the question of the competency of appeal. Cases were accordingly prepared, and the petition came on now for hearing.

*Coltman*, (K. C.) for the petitioner: The right of the King in council to hear and determine appeals from the colonial courts, on every subject, and of every amount in value, is one of the most ancient and undoubted prerogatives of the Crown.(a) No prerogative right of His Majesty, much less one which is calculated, as this is, for the relief and protection of the subject in distant countries, can be abridged or abrogated, except by the most direct and express words of an act of the general legislature. The King himself cannot derogate from his own right, or refuse to exercise his own prerogative for the benefit of the subject. Lord *Mansfield*, in the case of *Hall v. Campbell*, states it as a clear proposition, " that if the King has a power

(a) Black. Comm. vol. 1st, book 1st. cap. 5, p. 281.

“ to alter the old, and introduce new laws, in a conquered country, this legislation being subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles.”(a) One of those fundamental principles has always been understood to be, the right of all who are injured by the determination of the courts in His Majesty’s colonies, to appeal to him in his council for redress. It is true, that in the instructions to the governors of plantations there is a limit put upon their power to allow appeals in causes where the amount in dispute is under a certain value; but in all those instructions there is an express reservation of the power of the King himself, in council, to admit appeals upon any terms, and for any value. As far as regards the province of Lower Canada, there are no words in the English statute of the 31st Geo. the III. which take away from the subject the right of appeal, to which he is entitled by the common law of England. The words of the provincial statute of the 34th Geo. III. are certainly more extensive; but in that also there are express provisos, that nothing therein contained should derogate from the rights of the Crown, either to constitute other courts of justice, or from any other right or prerogative of the Crown whatsoever. It would, indeed, be beyond the power of a provincial Legislature to take away the rights of His Majesty to receive appeals, even if such were their intention; and if such a construction were to be put upon this provincial act, it would be inconsistent with the 31st Geo. the III. which has been always regarded as the constitutional charter of the Canadas.

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(a) Cowper, R. 209.



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*Lushington*, (Dr.) and *McDougall*, appeared for the respondents.

MASTER OF THE ROLLS: It is not necessary to hear counsel on the other side. The King has no power to deprive the subject of any of his rights; but the King, acting with the other branches of the legislature, as one of the branches of the legislature has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights.—This petition must therefore be dismissed.

This case is reported in *Knapp's* reports of cases before the Privy Council, p. 72, vol. 2.

Before the institution of the foregoing appeal, the opinion of the late Lord Chancellor, then Mr. BROUGHAM, was taken upon the case, and whether under the facts therein stated, notwithstanding the statute of Lower Canada establishing a limitation of the right of appeal as above mentioned, Mr. Cuvillier might not by petition to His Majesty in his privy council, obtain the benefit of an appeal from the said judgment of the provincial court of appeals of the 30th of July 1821.

#### OPINION.

I am clearly of opinion that no such limitation is valid to bar an appeal to the King in council. By law his right of appeal can only be taken from the subject by a new law. I should greatly doubt if any colonial act *though allowed by the Crown*, if unconfirmed by act of parliament, has power to take from the subject this right. But a colonial act never allowed, can clearly have no effect. Even in cases where a limitation has been validly introduced by law, the privy council have been in the practice of allowing appeals almost as a matter of course: Such petitions are termed petitions of *doleance*, and I believe never refused, although the law may have excluded appeals under a certain amount or after a certain time.

Lincoln's Inn, 21st June 1823.

HENRY BROUGHAM.

It would perhaps not be found inconsistent with the foregoing decision that an appeal might be allowed to His Majesty in his privy council, where the sum in dispute was less than £500 sterling, and where more than a year and a day had elapsed from the judgment in appeal which one of the parties is desirous of bringing under the revision of His Majesty in his privy council. It would seem that where the question arising upon the appeal from a sentence of a colonial court to His Majesty in his council, is one of ordinary municipal regulation, relating to the credibility or competency of particular witnesses, or to the weight of evidence, or to the regularity in point of form of the proceedings in the cause, or generally wherein the grievance complained of is applicable to the party appellant and confined to his cause, then the limitation of the right of appeal to certain cases in amount, would be followed by His Majesty in his privy council. And this not merely because the limitation in question was established by the colonial legislature, but because such limitation is convenient and sanctioned by long

usage, and the court of the King in council itself. Such a limitation has at all times existed in relation to appeals from the French Islands of Guernsey, &c. and in the old British colonies; and as to the latter it would probably be found that the limitation had been extended to them by analogy, from the practice which had long obtained as to the former, and to be traced to the power of entertaining or rejecting appeals from the colonies, according to a certain known practice which the supreme court of appellate jurisdiction has at all times exercised, and which, being the practice of that court, is the law of it. It is difficult to conceive any other reason why appeals from interlocutors rendered in the courts of the French Islands, and of the colonies, have been universally disallowed by the privy council, whilst appeals from interlocutors rendered in the Scotch courts have, in the cases permitted by law, been allowed by the house of lords. Appeals from Guernsey, &c. to the King in council, have in all cases exceeding £300 been allowed, and a like rule obtained in all the British colonies. In this view our provincial statute then in enacting that appeals to the King in council shall be only in cases above £500, cannot be said to have abridged, or attempted to abridge the appellate jurisdiction of that court.

At the same time that such, it is apprehended, is the general rule, there is a class of cases which may perhaps, not be comprised within it.—It seems to be essential to the maintenance of the *imperium* of a metropolitan state over its subordinate possessions, that the judicial pre-eminence should reside in the metropolitan state, and, therefore, that the right of judging in the last resort, as well in criminal as in civil matters arising in the colony, or subordinate state, should be held by the parent or metropolitan state: otherwise it would be in the power of the subordinate state, by judicial decisions, to undermine and ultimately to absorb the authority of the metropolitan state. It is in questions touching the relations, however remote, between the two states,—and the operation of the laws of the one within the limits of the other, and concerning in any way, however indirectly, the sovereignty of the one over the other,—that the acts of the colonial legislatures, must be interpreted, or if need be, controlled by the authority of the metropolitan state. And with respect to this class of cases, the King in council could and ought, it is conceived, to entertain appeals,—however small the sum in controversy might be,—if the cases were such as called for the interposition of the judicial authority. Thus, in the case of a decision in the colonial courts concerning the operation of the English bankrupt laws within the colonies: or, the statute of George the second, enacting that lands in the colonies should be seized and taken in execution as chattels, and that examinations taken before lord mayors of towns in Great Britain, shall in cases be received as evidence in the colonies,—or touching the prerogative, the ecclesiastical establishment, or connected in any other way with public laws,—appeals would probably be entertained by the King in council from the colonies. The above distinction appears sufficiently clear, and according to it the public convenience is consulted without any infringement of the right of the parent state.

The following cases may be consulted *Christian v. Corren*, 1 Peere Williams, p. 329. *Fryer v. Bernard*, 2 Peere Williams, p. 261. Sel. Ca. Ch. 5. 9 Mod. 124. No words in a grant can deprive a subject of his right to appeal, much less if the grant be silent.

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## ON APPEAL FROM QUEBEC.

ROBERT WOOD.....*Appellant.*

and

HORATIO GATES *et al.*.....*Respondents.*30th April,  
1833.

The court will quash an attachment by writ of *arrêt simple* where by any other person than the defendant in an action is divested of possession of property.

THE respondents in this case prosecuted an action of debt on a bond, and obtained a writ of *arrêt simple*, or *saisie conservatoire*, by virtue whereof an attachment was made in the hands of the appellant of a certain quantity of timber alleged to belong to the defendant. The sheriff seized the timber, dispossessed the appellant of it, and appointed a *gardien* for its safe custody. A motion was made in the court of King's Bench to quash the seizure, which was disallowed, and thereupon this appeal was instituted.

REID, CH. J. The *arrêt simple*, or *saisie conservatoire*, although not in general use, yet when made upon property in the hands of the debtor, may be executed in such way as to divest him of the possession of that property; the law in certain cases gives the creditor a right, even before judgment, thus to attach his debtor's property; but when the attachment is made in the hands of a third party,—as the debtor of the debtor, or as holding property belonging to him,—there cannot be a corporeal seizure of the thing attached, nor can the *tiers saisi* be dispossessed of it, inasmuch as he is not the personal debtor of the party seizing, nor liable to any condemnation until he has made his declaration (or refused to do it) of what he owes, or has in his hands, belonging to the

debtor, and even then he is considered only as the depositary of the thing seized, subject to the order of the court, by which only a personal liability attaches on the *tiers saisi*. The attachment of property *en main tierce*, is a mere notification or denunciation of the right or claim of the creditor upon the property of his debtor in the hands of a third person ;—it is compared by *Pigeau* to an opposition made in the hands of such third person, so as to prevent his disposing of it to the injury of the creditor ;—he considers it more an *acte de conservation qu'une contrainte*, and consequently neither the same formality is used, nor the same constraint exercised, as when enforced upon property in the hands of the debtor ; nor can the possession of a third party be molested until his liability as a debtor has been ascertained. This case has more the appearance of a *saisie-execution* than an act merely conservatory, or *saisie-arrêt*, in the hands of a third party : here is a *commandement de payer*,—the whole debt of the plaintiffs,—the *contrainte* or actual seizure of the timber, and the dispossessing the appellant thereof by the appointment of a *gardien*, proceedings which could have been warranted only on the *saisie-execution*, and which *Bourjon* seems to consider as a nullity under the *saisie-arrêt* :—he says, “ Le créancier ne peut faire “ *saisir* des effets, des meubles, des hardes, qui seroi- “ ent entre les mains d’un tiers, ce serait une espèce “ de *saisie-execution*, et non *saisie-arrêt*, et par conse- “ quence il y aurait nullité.” Although the injury here may not have been great, yet it is the principle to which we have to look, and it must be held unjustifiable, that the property of any individual, who is not a debtor, or wrong doer, nor charged as such,

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should on the suggestion of another be locked up, or put into the hands of a bailiff under colour of a writ of *saisie-arrest*. In such cases the injury may be great, but the remedy uncertain.

The appellant's motion for setting aside the attachment is therefore granted.\*

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ON APPEAL FROM QUEBEC.

JOB MOOR AND ANOTHER.....*Appellants.*

and

JOSEPH DYKE AND ANOTHER.....*Respondents.*

30th April,  
1833.

A sells a quantity of timber to B, a part of the price only to be paid on delivery of the timber. A makes a delivery and B omits to pay any part of the price, thereupon A brings an action to rescind

the contract of sale and by process of *saisie revendication* attaches the timber. Held that this action could be maintained and that the timber so far as it could be identified should be restored to A.

IN October 1830, the appellants sold to the respondents a quantity of red pine timber contained in two rafts, at 7½d. per foot, on the following terms of payment, one fourth of the amount to be paid on the delivery of the timber, one fourth on the first of April, one fourth on the first of May, and the remaining fourth on the first of June then following. On the fifth and 6th of November 1830, the measurement and delivery of the timber was effected, when the rafts

\* LEE v. TAYLOR. *Per curiam*. If an attachment be issued to seize property in the hands of A and under the writ the sheriff attaches property in the hands of B the seizure is null *propter defectum auctoritatis*, and the court will restore the property to B without enquiring into his right or title to it. B. R. Q. 1811, No. 518.

were found to contain 100,771 cubic feet, which at the price stipulated amounted to £3044. 2. 5. of which one fourth or £761. 0. 7. became due and payable on the delivery of the timber. After the timber had been delivered, a part of it was hauled up on the beach, and mixed with other timber belonging to the respondents, part of it was brought within their boom in the river, and the remainder lay on the outside of the boom. The respondents when called upon to pay the first instalment, which became due on the delivery were unable to meet the demand, as they had become insolvent. On the 11th November a protest was made against them by the appellants, and a demand for the restoration of the timber; this having been refused the appellants instituted an action to obtain a rescision of the contract, and a restitution of the timber which they caused to be attached under a writ of *saisie revendication*.

REID, CH. J. The contract is to be considered as conditional, and the delivery of the timber made only on the faith and condition of obtaining a certain portion of the stipulated price, and as such condition had not been complied with, the vendors were deceived, the contract was broken, and in such case they could not be considered as having parted with their property, a principle consistent with justice and recognized by the commentators on the 176th article of the custom of Paris. *Brodeau* says, "jusqu'à ce que le vendeur ait été payé et satisfait de sa chose qu'il a vendu sans terme, il conserve son droit de propriété et par conséquent de suite sur la chose, qu'il peut réclamer et vendiquer comme sienne, &c." (a) The

(a) Ferrière Gr. Cout. on 176th art. p. 1321, No. 5. *Brodeau* on the same. See *Supra*, 424.

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article of the custom seems to recognize the property as not altered by sale and delivery in such a case, as it says, that the vendor *peut sa chose poursuivre*, &c. it calls the thing sold, *sa chose*, as descriptive of his right in it, and hence it is held, that the landlord for house rent cannot exercise his privilege on the effects purchased by his tenant, but not paid for, as they are considered not to be his property. The intent and object of the article is to restore to the vendor his property, and put him in the same state he was in previous to the sale and delivery, which necessarily carries with it a rescision of the contract. And there can be no doubt, that if after the sale, but before the delivery of the timber, the vendors had been made acquainted with the insolvency of the purchasers, the former would have been entitled to retain the timber until satisfaction was made for it. So in England, where goods are not paid for on delivery, as agreed, trover lies for them, and the principle must be universally recognized, that a conditional contract cannot be binding until the condition be performed. The main difficulty is, whether under the circumstances the restitution demanded can be granted, and to what extent? It is certain that an article, of the description of that sold, does not lose identity by change of position, although it may by change of form,—logs of pine timber, having particular marks, although formed into a raft, will not be considered as losing their identity by being separated,—they are not like a bale of goods, which when opened and unpacked, their identity cannot be ascertained; but in this case the court considers the identity as ascertained, as

well by the return of the sheriff to the writ of *saisie revendication*, as by the evidence adduced, and it will apply to all the timber seized on the outside and within the boom of the respondents, but as to the logs which were hauled up on the beach, and mixed with other and similar timber, with similar marks, belonging to the respondents, identity cannot be made out, and therefore, restitution as to this part cannot be granted. The judgment of the court, therefore, is that the contract between the parties be rescinded, and annulled, and the respondents thereupon condemned to restore and deliver back to the appellants the aforesaid quantity of 100,771 feet of timber sold and delivered to them, as before mentioned, and on default thereof, to pay the aforesaid sum of £3044. 2s. 5d. and it is ordered, that the attachment on all the timber seized on the outside and within the boom of the respondents, be maintained, and after measurement thereof made, be restored and delivered up to the appellants in part payment and satisfaction of this judgment; and that *main levée* should be granted as to the timber hauled up on the beach.

**AYLWIN v. McNALLY.**—This was an action of *revendication* in which the plaintiff claimed goods sold and delivered upon a term of credit. **PEN CURIAM.**—The vendor of goods sold for ready money, may revendicate: also, if he is not paid, for goods sold, to be paid for on demand. 2 *Bourjon*, 689, art. 76. But even in this case he must institute his action within eight days after the sale so made.—*Ib.* No. 78. 1 *Battur* 36, and it is also essential that no act of ownership on the part of the purchaser should have been executed, and the goods must, therefore, until the commencement of the action, have remained in the identical state and condition in which they were delivered. 2 *Bourjon*, 689. No. 79. 690. Nos. 80, 81, 82. 1 *Pigeau*, 465. *Actes de Notoriété* of 13th May 1711, p. 371. It is clear, therefore, that the action in such case is founded upon this principle, that according to the conditions and terms of the contract between the parties there has not hitherto, been any sale of the goods claimed, payment before delivery having been stipulated:—But how can this be said to be law in a case like the present in which the vendor has sold, without any condition, has made his delivery, and has agreed to receive payment at a future period, long

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Goods sold for cash, but not paid for, may be followed and claimed in an action of *revendication*, provided that the action be commenced within eight days after the transaction, and the goods have remained until then in the state in which they were delivered.



HARVEY *against* MATTHEW LORD AYLMER.

7th June,  
1833.

An action cannot be maintained against a governor of this province while in the administration of the government.

THE plaintiff's declaration alleged that in November last she was hired as housekeeper to the defendant, at the rate of £10. sterling per annum, but was discharged from his service at the expiration of two months, without just or sufficient cause, by which she had sustained £100. sterling, damages. The defendant, by a declinatory exception, after alleging that he was Governor of the province, averred that so long as he continued to execute the said office and trust, no suit or action could be had or maintained against him in any of his majesty's courts of justice within this province, for any matter, cause or thing whatsoever.

*Bowen*, for the defendant. This exception of the defendant differs from the ordinary English plea to the jurisdiction in this respect, it contains no allegation of a better or more proper jurisdiction, because, in fact, there is no other tribunal to which the defend-

after delivery, 2 *Bourjon* 689. No. 75. *Pigeau*, l. c. *Duplessis' Exécutions*, Nb. II. p. 8. *Pothier's Cout. d'Orl.* 785, art. 458. note 1, by which the inference of a condition requiring payment before the sale should be perfected by delivery, is effectually destroyed. Action dismissed. B. R. Q. 1812, No. 340.


Vide an Arrêt in Grainville of the 26th July 1726, p. 524; and 2 *De Lamoignon*, 149, and seq. where the principle of this decision seems to be contradicted, but it is to be observed that the authorities above cited are in date posterior to the time at which *De Lamoignon* wrote.

In France manufacturers seem to have possessed a right to revendicate in all instances and at all times if not paid, but this was an exception to the general rule. See an Arrêt cited in *Rogue. Jur. Consul*, vol. 2 p. 44.

ant is at present amenable, the king in council cannot hold plea of any kind, and the courts in England can exercise no jurisdiction over him as long as he resides here. His situation in this country is in many respects analogous to that of a foreign ambassador residing in England, and it is certain that in a plea to the jurisdiction of the king's courts in England, a foreign ambassador could not be expected to allege another jurisdiction; this case, therefore, is an exception to the general rule; the facts are distinctly libelled, which is all that can be required. It may be objected that the defendant's commission has not been produced in support of the exception, but it is contended that it is the duty of his majesty's subjects within this colony to know that the defendant is Governor in Chief of this province, and more particularly, of the judges of the courts of justice to know the governor's hand and seal, and to enforce obedience to his proclamations: this court must know judicially that the defendant is governor of the province. The necessity of the allegation in the exception that the defendant is captain general and governor in chief of Canada, arises from the omission on the part of the plaintiff to give him his proper additions, to which the defendant might have objected were he not disposed to afford every possible facility to the plaintiff in obtaining a hearing of her cause, provided it could be done with propriety.

Whether the courts in this province can legally entertain any action against the governor, is the only question of importance which the case presents. For its determination it will be necessary to ascertain the nature of the trust and the extent of the

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powers conferred upon governors of colonies. A governor is one of the constituent parts of the colonial legislature, and as such is invested with royal authority ; he can call, prorogue, adjourn and dissolve it ; he has, with very few exceptions, the appointment to all government offices, and is actually the fountain of all honor within this province, and within the limits of his government invested with supreme power. (a) It is from the like attribute of pre-eminence or supreme power that no suit or action can be brought against the king even in civil matters, because no court can have jurisdiction over him, *for all jurisdiction implies superiority of power* ; authority to try would be vain and idle without an authority to redress ; and the sentence of a court would be contemptible unless that court had power to enforce the execution of its judgment ; hence it is that the person of the king is sacred, no jurisdiction has the power to try or condemn him, for if such a power were vested in any domestic tribunal there would be an end to the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power. If the court can entertain an action against the governor of the province it must also have the power to enforce the judgment, for authority to try is vain and idle without authority to redress : it must also have the right to take his person in satisfaction. The governor must also be subject to arrest at the suit of any individual to whom he may happen to owe a sum of £10. sterling should his duty call him from Lower to Upper Canada, or to some other part of the provinces within the limits of his government. If the

(a) Chitty on the Prerog. 34. 35. 36.

free agency of the king, as one of the constituent parts of the sovereign legislative power, cannot constitutionally be destroyed, the free agency of the governor, as the head of the provincial legislature, must for the same reason be preserved ; to what end would the courts pronounce a judgment against the defendant which it could not enforce, for he is not liable to criminal process, and therefore could not be committed for a contempt of court, if he thought fit to resist the execution of its judgment. Previous to the passing of the imperial statute, 12th, William III. c. 12, governors of colonies were not *answerable, even in England*, for any crime or offence they might commit within the limits of their respective governments, because by the common law an indictment could only be preferred in the country where the offence was committed, nor, as appears by the preamble to that statute, were they accountable for such their crimes and offences to any person within their respective governments. Thus it appears that governors of colonies are not now, and never were considered amenable to the courts within the limits of their respective governments for criminal offences. Now if their privilege has hitherto preserved the king's representatives from the jurisdiction of the courts within the limits of their respective governments, even when charged or accused of capital crimes, the same privileges, with much less danger to the public peace, will necessarily preserve their free agency and protect them from the jurisdictions of the courts in civil matters. The imperial parliament in passing the law before alluded to for the protection of his majesty's subjects within the colonies, by rendering governors amenable in England for such offences as they might commit within the

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limits of their governments, would certainly not have omitted to provide a remedy at the same time for the redress of civil injuries, had it not been known that all personal actions against governors might be brought in England. In fact, the precedents of actions against governors of colonies upon their return home, after being recalled, are so numerous, that I shall not take up the time of the court by citing any of them ; no precedent, however, of an action maintained against the governor of a colony, within the limits of his government, is to be found. The oldest case at all analogous to the present occurred at New York in 1733. Mr. *Van Dam*, who had performed the duties of president during the absence of governor *Crosby* in England, attempted upon his return to New York to summon Mr. *Crosby* before the king's courts there, in an action for money had and received, but in this attempt he was not successful, the prothonotary refused to affix the seal of the court to the writ, nor would the court order it. (a) In this colony governors have occasionally come in collision with his majesty's subjects, but no attempt was ever before heard of to render them amenable to the courts of the province. Soon after the conquest of Canada, *Pierre de Calvert*, a French gentleman, fell under the displeasure of His Majesty's representative, general *Haldimand*, and was imprisoned by him for three years, and then discharged without trial. *Calvert* submitted a memorial to Lord *North* and Mr. *Fox*, and upon a change of Ministry, Lord *Sidney* ; these memorials were published with a statement of the case in London in 1774, dedicated to His Majesty. These memorials all contain a prayer for an order upon general *Haldimand* to proceed direct

(a) 1 *Smith's History of New York*, 5.

to England to prevent his returning to Switzerland, of which country he was a native, and the reason assigned for so doing was, that he could not be sued in the province of *Quebec*, so long as he continued governor, his high office placing him above the jurisdiction of the courts of the province, and because during his residence therein he was beyond the reach of the King's courts at Westminster Hall. In the appendix to a work published in London in 1776, intituled an account of the proceedings of the British and other protestant inhabitants of *Quebec* in North America, to obtain a House of Assembly, will be found some remarks on the illegal arrest of Mr. *Thomas Walker*, by *G. A. Carlton's* warrant in 1775. The writer is supposed to be Mr. *Mazeres*, formerly attorney general of the province, after citing authorities of imprisoning by his own warrant, to shew that the power is withheld from the King himself, and for this reason, that if he was to do wrong the injured party would have no action against him, observes that the same law subsists in the American provinces with respect to the power of the governor, and for the same reason he cannot imprison any of the King's subjects under his government by his own warrant, or order of commitment, because he cannot be sued and compelled to pay damages to the party whom he might thereby have injured, in the courts of the province of which he is the governor. These cases are of course not cited as authority, but as written reason, and in the absence of authority as historical facts. But the judgment of Lord *Mansfield* in the case of *Fabrigas v. Mostyn*,<sup>(a)</sup> is conclusive upon this question; the action was for banishment and false imprisonment. A verdict and judgment was

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(a) Cowp. p. 161. 11 State Trials.

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given against the defendant for £3,000 damages; upon the refusal of the common pleas to grant a new trial general *Mostyn* resorted to a writ of error, the case was accordingly heard before Lord *Mansfield* in the King's bench, and the judgment of the common pleas affirmed. One of the grounds of exception to the judgment was, that general *Mostyn* was governor of *Minorca*, and therefore, for no injury whatsoever could any evidence be heard, and that no action could lie against him. In disposing of this objection Lord *Mansfield* said that the first point he should consider was the sacredness of the governor's person, and declared that an action if it did not lie in England against any other person for injuries committed by them in an English colony, that is beyond seas, should emphatically lie against the governor; he proceeded in these words, "It is truly said that a governor is in the nature of a viceroy, and of necessity part of the privileges of the King are communicated to him during the time of his government; no criminal prosecution lies against him, and no civil action will lie against him, because what would the consequence be: why, if a civil action was brought against him and a judgment obtained for damages, he might be taken up and put into prison on a *capias*; and therefore, locally, during the time of his government, the court in the island,—*Minorca*,—can not hold pleas against him." It is not considered that the governor of *Canada* is above the law, the King himself neither has or pretends to any such privilege; the imperial "*sic volo sic jubeo stet pro ratione voluntas*," neither is or ought to be the maxim of an English King or of his representative. A governor of *Canada* cannot be guilty of any act of either public or

private oppression with impunity, his removal and punishment would follow as a matter of course, any such dereliction from the path of his duty. It is, however, of the very essence of the British constitution, for the sake of unanimity, strength and despatch, that such powers as have been enumerated, should be entrusted in a single hand. It is a principle that in the exercise of lawful prerogative the King is and ought to be absolute, there is no legal authority that can either delay or resist him; so in the exercise of his delegated authority, a governor is and must be absolute, nor can any power within the colony delay or resist him. This doctrine it is contended, is neither dangerous or inconsistent with English ideas of liberty; civil liberty as understood under the British constitution, consists in protecting individuals by the united force of society, that protection cannot be afforded nor society maintained without obedience to some one individual invested with sovereign power, whose person must be sacred, and that individual in this country is His Majesty's representative.

Ahern, for the plaintiff.—If this plea can be maintained there exists in this community, a person not amenable to the laws, and possessing powers more than dictatorial, claiming not only the prerogatives of the King, his master, but privileges greater than those of the Monarch. We every day hear the governor called the King's representative, and the defendant in this cause has allowed himself to be led away by this; nothing is more inaccurate than this expression in the sense in which it is used. "Constitutionally the King is the founder of all office, honour and power, and each officer of the government, deriving his authority from

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the King, represents the King in the exercise of his legal power,—this is as true of the highest as of the lowest officers,—it is as true of a constable as it is of the lord chancellor of England. In no other sense can it rightly be applied to the governor of a colony. None of the particular attributes of sovereignty, under the constitutional laws of England, are applicable to that officer. The King can do no wrong. Is that true of a provincial governor? his powers are originally inherent and perpetual; that of a governor is derivative, temporary and dependent upon the will of him who conferred it. Constitutionally the king is answerable to God only for his acts. The governor is answerable to his royal master. The king is amenable to no human tribunal for the discretion which he exercises in the execution of the functions of his *public* duty. The governor is answerable to the king and to his courts for every act by him performed; the privileges of the king are personal and cannot be delegated; the governor is but the minister or servant of the king, and cannot pretend to any privilege beyond his personal liberty. The maxim that the king can do no wrong is a necessary and fundamental principle of the English constitution, meaning only, that in the first place, whatever may be amiss in the conduct of public affairs, is not chargeable on the king; nor is he, but his ministers, accountable for it to the people; and *secondly*, that the prerogative of the crown extends not to do any injury, for being created for the benefit of the people it cannot be exercised to their prejudice. The subject in England has recourse against the king if any of his private rights are invaded by petition of *right* or *monstrans de droit*, upon which execution may

issue. (a) Shall then a governor of a province claim exemption from a process to which his royal master is amenable? Shall he who shines with a borrowed light, claim privileges greater than those belonging to him from whom he derives his temporary grandeur? This question must be decided by the *lex loci*, where the ground of action arose; in this instance it is the old law of France, and it may be asked if the king of France could not have been brought before the courts of justice in Lower Canada? It appears that he could, and no where is this more clearly stated than in the *Discours sur l'étude de la Procédure* in the preface to the *Procédure Civile du Châtelet de Paris*, 40 and 41. "Notre gouvernement a toujours regardé comme une de ses principales obligations de ne pas gêner l'exercice des actions qu'un citoyen croit avoir droit de diriger contre un autre : de sorte que l'on peut en France traduire en justice sans aucune permission, les gens les plus élevés, même le *souverain*, lorsqu'on prétend ses droits portés au-delà de leurs bornes légitimes par ceux qu'il a chargés d'y veiller." Thus, not only was the king in France answerable for the wrongs done to his subjects of a private nature, but also, for those committed by his servants when they exceeded the powers legally vested in him. An opinion of Lord *Mansfield* in the case of *Mostyn v. Fabrigas* has been cited, "that locally during his government no action will lie against a governor; because upon the process he would be subject to imprisonment;" such may be the law in England, and such appears to have been the law at that time in Minorca,

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(a) Chitty, 348-9.

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where the ground of action in the case above alluded to originated ; but such is not the law in this province, and it does not here follow as a matter of course, that upon process the party is subject to imprisonment, *cessante causâ cessat effectus*, that being the only difficulty in the way, and that difficulty being removed, there is no disability incapacitating the plaintiff from seeking redress here ; and further, as the present action is a purely personal action arising from acts in no way connected with the public character of the defendant, it is clearly maintainable in this country, and the question of prerogative or not prerogative cannot, strictly speaking, be taken notice of by the court. The exception ought to be dismissed ; should it be otherwise, I fear the public, with too much truth, will apply the lines of the Roman satyrist, on the drunken *Marius*, to the present occasion ; and they will say of the defendant in this cause, (for setting up such a defence) as was formerly said of him, *hic est damnatus inani iudicio*, and if this court maintains the present exception, well may the colonists exclaim, *At tu victrix provincia ploris*. And then indeed will I begin to believe that which was said of the Roman colonies, viz. ; that a colony is better governed when the metropolitan state is subject to a despotic government, than when under a free government, for each governor of a province being a petty tyrant, the colonists cannot obtain a sufficiently speedy relief by the tardy forms required under a free government ; whereas the despot, jealous of others, upon the first complaint, removes the imitator, and the only hope a governor has under such circum-

stances, of maintaining his post, is to secure the affections of the people.

Thus far on the merits, now as to form : this plea ought to be dismissed, 1. Because the defendant has not produced or fyled his commission, and the defendant in this cause is liable to the same rules of pleading as any other defendant ; and if he sets forth in his plea a written instrument, he must produce it. Now, as to the sacredness of the defendant's person as governor, if it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification, because *primâ facie* the court has jurisdiction, and if the defendant in this cause has not produced and fyled his commission, the same rules apply to him as to others, *de non apparentibus et de non existentibus, idem est jus*. 2. Because in every plea to the jurisdiction, the party pleading must shew a more proper and a more sufficient jurisdiction.

Bowen, in reply. It has been admitted that the defendant is privileged from arrest, and that his person is sacred ; now, in admitting this, the plaintiff admits the truth of my proposition ; for if his person is sacred, he can with impunity resist the process of the court, and is therefore not subject to its jurisdiction. It has been said, however, that according to my statement the defendant possesses powers and privileges which the king himself does not possess, and therefore cannot delegate, and that by Magna Charta, the petition of right is secured to the subject. It is true that in England the subject is entitled to a petition of right, but it is not true in this country, nor is there any proceeding here in any way analagous to

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the petition of right by which a governor can be sued. It is of the very essence of the petition of right, that it should contain nothing of a mandatory nature, and the writ of execution, if necessary, is issued, directed to his majesty's treasurer and chamberlains, who if they neglect to satisfy the judgment out of the first monies that come into their hands, are held personally liable, for if the court had not the power of enforcing the judgment, the petition of right would be perfectly useless. It is contended that this action if successfully prosecuted to judgment, would not give a right of *capias ad satisfaciendum* to the plaintiff, it would certainly give a right of seizing the defendant's effects, who could resist the execution of the judgment with impunity, because the court cannot commit him for contempt. The citations from the French law are not binding here, because it is a question of prerogative to be decided by the law of England. As a part of Lord *Mansfield's* judgment in the case of *Fabrigas v. Mostyn*, has been used as an argument against me, I mean that part of it which alludes to the omission of general *Mostyn's* counsel in not filing his commission in support of the allegation, that being governor of Minorca, he was not answerable for any injury done by him in that capacity: I shall explain the difference between them: Lord *Mansfield* was undoubtedly right in his view of that point, the King's courts in England could not know that general *Mostyn* had been governor of Minorca, except by the production of his commission, for the action was not brought within the limits of his government: the situation of the courts in the two cases is not at all similar, for the court here is bound

to know and obey the governor of the province. The constitutional checks upon the power of governors of colonies, have hitherto proved sufficient, and when it is considered that upon their recall, governors are no longer protected from the process of the King's courts, but are answerable not only for their debts, but also for any abuse of their delegated authority, the apprehension that might be entertained from entrusting them with such powers as I have contended they possess, and of investing them with such important privileges, must be entirely removed; any slight inconvenience that an individual may suffer is much more than recompensed by the public peace and security of government which is found under our present constitution.

SEWELL, CH. J.—If there were any room to doubt the validity of the exception which has been filed, on the part of the defendant, we should certainly be disposed to put this case *en délibéré*, but as there is none, and the question submitted has received a judicial decision on several occasions, and has been for some time pending before us, we think it right to deliver our opinion without further delay. It is not for courts to enquire whether the rule of law in any particular instance be or be not wise or politic, it is sufficient for them that such is the law, and as they find it so they are bound to declare it. The question which we are now required to decide is singly this: whether an action can be maintained against the governor of a province, while he is in the administration of the government, as the representative of the sovereign? and we must say that an action cannot be so maintained, because we are satisfied that such is the law. The decision on the case of *Fabrigas* and *Mostyn* is well

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known, and is sufficient even alone to determine this question. *Fabrigas*, for a civil injury done to him by *Mostyn*, at Minorca, while the latter was governor of that island, instituted an action of damages in England against *Mostyn*, and in his defence it was contended that *Fabrigas* ought to have prosecuted his suit in Minorca, but it was answered that, *Mostyn* being the governor, no action against him could be sustained in Minorca, and on this ground the action instituted in England was maintained. In delivering the judgment of the court of King's bench, Lord *Mansfield* declared the law upon the question before us in the following explicit terms: "It is truly said, " that a governor is in the nature of a viceroy, and " therefore, locally during his government, no civil or " criminal action will lie against him." (a) In the case of *Van Dam* against *Crosby*, governor of the late province of New York, cited at the bar, this principle was recognized by the supreme court of that province, and the cross action instituted by *Van Dam*, in consequence thereof, failed. So in the case of the celebrated *Napper Tandy* v. the Earl of *Westmoreland*, which was instituted in the court of exchequer of Ireland, in the year 1792. The Earl being then the Lord lieutenant, was summoned by writ of subpoena to appear and answer. The attorney general moved that their lordships would be pleased to quash the subpoena, and prohibit further process. *Butler*, of counsel for the plaintiff, in answer, contended,—as it has here been contended,—that the court had no judicial cognizance: that the Earl of *Westmoreland* was lord lieutenant of the kingdom. The court, however were of

(a) Cowper's Reports, p. 172.

opinion that they held the fullest judicial knowledge of his excellency's authority as lord lieutenant of Ireland, in a degree which made it absurd to doubt.— They saw him in parliament acknowledged by both houses; they saw him ministering in all the functions of His Majesty's representative, and acknowledged by the whole kingdom to be such. "Then," said the court, "where is there a shadow of doubt,—there can be none,—and knowing and seeing all this *de facto* as we do, we have nothing to do with speculations *de jure*." The motion of the attorney general, on account of its being the last day of term, was continued to the next term, but it was ordered that no process should issue in the mean time against the Earl of *Westmoreland*, and here the matter dropped. We are informed in a way which leaves no room to doubt, that a decision similar in its effect to those which have been cited, has lately been given in a neighbouring province, but as the particulars of the case are imperfectly known, we can make no further use of it at present.(a)

Upon the whole, we are of opinion that the exception must be maintained and the action dismissed *quantum a présent*.

KERR and BOWEN, *Justices*, expressed their assent to this opinion.

PANET, *Justice*.—I do not concur with my brethren on the bench, not being fully prepared at this moment to pronounce an opinion upon the question which has been submitted to the court.

(a) The case here alluded to was that of the Honble. Mr. Black, a merchant in the province of New Brunswick, and the senior member of the Council. He was, a few years since, the President of that province, and when he became President, two or more actions, in which he was the defendant, were pending in the Supreme court. These actions were all suspended by that court, and during the period of his presidency no proceedings were had in them.

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ON APPEAL FROM MONTREAL.

HECTOR RUSSEL AND OTHERS.....*Appellants.*

and

WILLIAM FIELD.....*Respondent.*29th July,
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Litispendance
in a foreign
state is no bar
to an action
instituted in
this province.

AN action was instituted by the appellants against the Respondent, to which was pleaded the pendency of another suit between the same parties, and for the same cause of action, in the state of *Vermont*:—This plea was maintained by the judgment of the court below, which gave rise to this appeal.

The grounds upon which this judgment was impugned were, that whether such respect should be shewn to litispendance in a foreign country, as to suffer it to bar or suspend a suit, is a question of public law, and so must be decided by the laws of England, as a paramount authority throughout the empire.—According to the principles of English jurisprudence, litispendance in a foreign country, or even in one of the colonies, could not be pleaded in any way to an action in the courts of Westminster Hall. (a) Upon the supposition that this were a case to be governed by the practice of the French courts, litispendance in a foreign country could not be pleaded, as France was distinguished from most of the states of Europe by her shewing no regard for foreign jurisdiction. (b)

(a) 3 Atkyns, 587. - (b) Kluber *Droits des gens moderne de l'Europe*, I. 97.—Ord. 1629. art. 121. Merlin, *Qu. de Droit v; Jugement*, § 14, 19. Emerigon *des Assurances*, I. 125.

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Viewing the plea of litispendance abroad, in its true light, as ascertained by force of obligation, but *ex comitate*, the basis of that comity, which is reciprocity, would fail in the present instance, as in the state of Vermont, and the other United states of America, litispendance in a foreign country, or even in a sister state, cannot be pleaded to an action brought there.(a)

*Per curiam*.—According to French authorities this appears to be a question of public law. In France foreign judgments had no effect.(b) It was a part of the public law which might be regulated by treaty, not dependant upon comity. This principle has been maintained by the *Napoleon Code*, and a modern French *arrêt* has declared that litispendance in a foreign country is no bar to a suit. The case cited from *Atkins*, went to support the same doctrine. It has been made a grievance in this case, that two arrests had taken place, but an answer to this would be found in the case of *Maule v. Murray*,(c) where it was held, that a defendant who had been arrested in America, might be again arrested in England, for the same cause of action.

*Buchanan*, for the appellant. *W. K. McCord*, for the respondent.

Judgment reversed.

(a) 9 Johns. Rep. 221. 12. Johns. Rep. 99.  
 et seq. (c) 7. T. R. 470.

(b) 10 Toullier, 143.

## ON APPEAL FROM THREE RIVERS.

OUR SOVEREIGN LORD THE KING,  
*ex relatione* THOMAS COFFIN AND OTHERS...*Appellant.*  
 and  
 MAGLOIRE GINGRAS AND OTHERS.....*Respondents.*

29th July,  
 1833.

*A certiorari will lie for excess of jurisdiction and illegality in the proceedings of commissioners appointed by the governor of the province under the ordinance 31st, Geo. III. c. 6. for the building and repairing of churches.*

**I**N this case the principal subject of controversy related to the place where the new church of the parish of *St. Pierre les Becquets*, which was admitted by all parties to be required, should be placed; certain parishioners being desirous that it should be on or in the neighbourhood of the site of the present church, in the first concession of the parish, others again, contending that it ought to be placed in one of the rear concessions. An essential element in this enquiry, it was argued on the part of the opposants, would be in the will of the majority of the parishioners and in the relative proportion of that majority to the minority of the parish. It was understood that this had been so considered by the ecclesiastical authorities. But the opposants to the proceedings of the commissioners were under the impression that as well the commissioners themselves, as the ecclesiastical authorities, had been led into error on this point, by a series of illegal proceedings giving to the minority of the parish, the appearance, of being the majority, and at the same time, of such irregularity as to vitiate and render null the assessment and all matters con-

nected therewith. The grounds stated in the petition of the opposants were various alleged irregularities in the notice for the meeting, in the nomination of the Syndics in the making of the assessment, and in the establishment of the site of the church. The prayer was for a *certiorari*; this, the court of King's bench at Three Rivers ordered, and from this order the appeal was instituted.

SEWELL, CH. J. A *certiorari* does not go to try the merits of the matter in issue, but to see whether the limited jurisdiction has exceeded its bounds, and the jurisdiction of the court of King's bench as to the writ of *certiorari* is not at all affected by any statute which does not take it away in express terms. These points are so peremptorily settled that a clause in a statute which enacts, "That no other court whatsoever shall intermeddle with any cause or causes of appeal, but they shall be *finally* determined in Quarter sessions only" were held in the case of *Rex v. Moreley* (a) to mean no more than this, "that the facts shall not be re-examined," and consequently it was in that case determined that the legality of the proceedings of certain magistrates in the exercise of a limited jurisdiction vested in them by the statute, might be heard and determined in the court of King's bench by *certiorari*; and it is in fact obvious, that these principles must be well founded, for if it were otherwise there could be no such thing as a limited jurisdiction. (b) In the present case an application for a writ of *certiorari* upon the ground of excess of jurisdiction and illegality in the proceedings of the commissioners

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(a) 2 Burroughs, 1042.  
 213, 252.

(b) See *Groenvelt v. Burrell*. 1. L. Ray.

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for erecting churches in the district of Three Rivers, has been allowed by the court of king's bench, and from the allowance of that writ, this appeal has been brought. 1. Because the commissioners are under virtue of the especial provisions contained in the ordinance 31st, Geo. III. c. 6, appointed by the governor, and that he only can enquire into their conduct. 2. Because the powers exercised by the commissioners are legislative powers. Now, admitting that the governor has an appellate jurisdiction over the decisions of these commissioners, that would go to the merits of the questions before them, while the *certiorari* allowed by the king's bench can only go to their jurisdiction, and it has been settled that the existence of an appellate jurisdiction does not in any case take from the court of king's bench the right of proceeding by *certiorari*. (a) If it could be even made to appear that the governor might proceed upon appeal or by *certiorari* to determine the limits of this particular jurisdiction, his authority in this respect would be no more than a concurrent jurisdiction with that of the court of king's bench, for there is not a word in the ordinance which can affect the jurisdiction of the king's bench or the authority which that court possesses to proceed by *certiorari*. It has indeed been argued that the governor may exercise in person the power which he has delegated to the commissioners, and that in such case no *certiorari* could be issued. But it is not necessary for us at present to enquire what could or could not be done by the court of king's bench, if the governor should see fit to do

(a) *Rex v. Moreley. Supra.*

so. This is not a case in which the governor has exercised in person the jurisdiction created by the ordinance; far from it, it is one which has relation only to the exercise of that jurisdiction by certain commissioners appointed to carry it legally into effect, and as a *certiorari* does lie in the case of justices of the peace, who are appointed by the king to carry into effect the powers, which with respect to their jurisdiction, are by law vested in his majesty; so *a fortiori*, a *certiorari* may issue to commissioners appointed by the governor to carry into effect the powers which are vested in him by the ordinance for the erection of churches. It would, however, be a strong argument against the exercise of these powers by the governors in person, if it should hereafter be made to appear, that no *certiorari* can issue, even from his Majesty's supreme courts of law, to restrain a governor in the exercise of a limited judicial authority. The remaining ground for this appeal alleges, that the powers held by the commissioners are of a legislative nature, inasmuch as they enable them to assess a tax on the inhabitants of parishes for the erection of churches; now if they be so, the power held by the justices of the peace in England, which makes them to assess the tax for the support of the poor, must be of the same description; and yet the writ of *certiorari* lies and is daily issued in such cases,<sup>(a)</sup> and this is a manifest proof that the powers so exercised are not legislative in either case. In fact the tax in both instances is imposed by the legislature, and the authority exercised by the church commissioners is confined to

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(a) *Rex v. Milland*, 1 Burr. 576; *Rex v. St. Luke's Hospital* 2 Burr. 1053.

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the calculation and distribution of the amount required for the erection of a church in any particular parish, among the parishioners upon whom it is already imposed by law; just as the authority exercised by the magistrates in the assessment of the poor rates in England is confined to the calculation and distribution of the amount required for the support and maintenance of the poor of any particular hundred or parish, among the persons upon whom the tax is by law already imposed. Upon this view of the case before us this court is of opinion, that the writ was rightly allowed, and the judgment of the court below is therefore confirmed with costs.

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ON APPEAL FROM QUEBEC.

NICOLAS BOISSONNAULT.....*Appellant.*  
 and  
 JAMES OLIVA.....*Respondent.*

16th Novr.  
 1833.

Rivers, whether navigable or not, are vested in the Crown for the public benefit, and no person, seigneur or other, can exercise any right over them without a grant from the Crown.

**T**HE Respondent, plaintiff in the court below, instituted an action against the appellant for damages alleged to have been occasioned by the appellant's stopping up the communication on a public navigable river with a boom and chain, it appearing from an agreement between the parties, after the commencement of the suit, that the placing of the boom and chain tended to their mutual benefit, the action was dismissed.

river called the *Rivière du Sud*, by means of a certain boom and iron chain; whereby certain saw logs and pieces of timber belonging to the plaintiff, were stopped and prevented from arriving at his saw mills at *St. Thomas*, to his damage £2,000.

REID, CH. J.—The appellant, by his plea, admits the placing of the booms and iron chains on the *Rivière du Sud*, but denies that it is a navigable river: on the contrary he alleges that it is not navigable, but the property of the adjoining seigniors, whose permission he has to erect the boom in question, and to maintain the same: and by the general issue denies the facts stated in the declaration. Testimony has been adduced to a very considerable extent, to shew the waters of this *Rivière du sud*, the difficulties and obstructions to the navigation, and the kind of communication of which it is capable. Part of the evidence adduced by the defendant consists of an agreement made between the parties, and executed before Gagné, notary, dated 14th December 1831, which is a document of some importance in this cause as affecting the question before the court. Had this agreement been in existence at the time the plea was fyled in this cause, there is reason to presume it would have been set up as a bar to this action; but as it comes now in evidence before this court as resisting the plea of the plaintiff for damages, we must receive it accordingly, and must hold that in the face of such evidence the plaintiff cannot maintain his action. By this agreement it appears that it was for the mutual interest of the parties that a boom should be erected with a view to prevent the loss of timber floating down this rapid stream. This fact also corresponds with the other evidence in this cause; and in

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order the better to enable the defendant to keep his booms which he had erected for this purpose, the plaintiff agrees to pay a certain proportion of the expense, and that they should remain under the controul and direction of the defendant. The words of the agreement are, "*Cependant les frais d'autre lieu des booms appartenant à M. Boissonnault, sur la rivière du Sud, savoir ; celui de chez Joseph Tétu, et celui du bassin de St. Thomas, seront supportés par chaque partie à proportion de la quantité de billots qu'elles y auront ou pourront y avoir ; et néanmoins les dits booms et tels autres booms, que le dit N. Boissonnault a sur la dite rivière du Sud, ne s'ouvriront qu'à l'ordre du dit Boissonnault.*" The respondent here acquiesces, in the clearest manner, in the right of the appellant to keep up these booms without any reservation as to the present claim; he has judged his own cause, and must be stopped from claiming damages in the face of his own agreement, and even as respects the damages claimed, nothing is proved that would enable the court to assess them, and they cannot be ascertained by experts. It matters not therefore whether this river be navigable, or not navigable, *seigneuriale* or *flottable*, the consequences, as respects the damages, being the same.

Looking, however, at the right of the parties at the time the action was instituted, we are of opinion that the plaintiff was entitled to his action, whether the *Rivière du Sud* is to be considered as *flottable* or *seigneuriale*. There may be some doubt whether this river can be considered *flottable*, as rivers of this description would appear to be ranked among navigable rivers, *portant bateaux et radeaux pour le transport du bois et autres marchandises*, and as such were the proper-

ty, and under the protection and jurisdiction of the Crown. The *Rivière du Sud* appears capable of floating only single logs, and not rafts or bateaux, from the frequent interruption of the navigation from the rocks, shallows and rapids, to be found in it, and therefore is not to be considered as a navigable river; but, allowing it to be of the description of *seigneuriale et banale* the use of it, even in that case, must be free and open to the public: for according to *Fremenville*, (a) the King preserves his right over all such rivers as may be used for the floating of timber, inasmuch as he is considered to be the protector of commerce, and of the public interest. "Sa Majesté se charge de la police de ces rivières qu'il convient d'exercer pour l'aisance et la sureté des bois flottés a l'effet qu'il ne soit détourné des eaux de ces rivières, établies des moulins nouveaux *gourds, vannes* et autre édifices capable de nuir au flottage des bois par conséquent au commerce." But if the King were not to retain this authority over a *rivière seigneuriale*; yet the seigneur feudal cannot claim the property of these rivers, as according to the French system they belonged to the *seigneur haut justicier*, who was vested therewith, and exercised a jurisdiction over them; not so much for his own interest as for the public benefit, and was said to hold them in the same manner and for the same purpose as the King held and exercised jurisdiction over navigable rivers. In this country the King is the sole and only *seigneur haut justicier*; and as such protects the rights of all his subjects in matters of this kind, which under the French system was in-

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(a) Vol. 4. ch. 4. p. 434, 5.

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trusted to inferior officers.(b) The waters of all rivers whether navigable or not navigable, being matters of public benefit and public interest are vested in the Crown, and no man whether seignior or other can hold or exercise a right over them, without special grant from the Crown. No such grant has been ascertained to exist in the seigniors of St. Vallier and St. Thomas, nor could they convey to the appellant the right to stop up the communication on this river; but as the plaintiff has acquiesced in the act of which he has complained, and has agreed that the defendant shall keep up these booms as a thing beneficial to both parties; we therefore think that the judgment of the court below should be reversed, each party to pay his own costs, as well in the court below as in this court.

(b) 3 Desp. 128, 129, 158, 159, 212, 213. Boutaric, *De la Justice*, &c. 506, 538, 577, 578. Renauldon, *Des Droits Seigneuriaux*, 365, 371, 372, 391. 4 Fremenville, *Prat. des Ter.* 477, 497, 498, 480. Guypape, *Quest.* 514. Bouthillier, *Som. a. Liv. 1. ch. 73*. Loiseau, *Des Seign.* ch. 12, No. 120. *Dict. des Arrêts*, v. Rivière, Lacombe v. *Fleuve*. Ferrière, *D. D. v. Rivière*. *Tr. du Gouvernement des biens et affaires des Communautés d'Habitans*, 503.

## ON APPEAL FROM QUEBEC.

JAMES SWINBURNE.....*Appellant.*

and

LOUIS MASSUE AND ANOTHER.....*Respondents.*April 23,  
1834.

**M**ESSRS. *Caldwell, Crawford & Co.* of London, in pursuance of orders from the respondents, purchased divers goods for them, which were packed in sixteen packages, whereof the case numbered 14, contained amongst other goods, those of which the value was in controversy in this case. They were delivered at the office of *Caldwell, Crawford & Co.* by their clerk, to a carter, to be conveyed to the *London Docks*. Neither the agents of the respondents, nor any person in their employ, accompanied the goods. The clerk saw the cases and packages on the quay about an hour after they had been put into the custody of the carter, he did not see them shipped, and did not know when they were shipped. The mate of the *Great Britain* deposed that they were regularly stowed in the hold of the ship, and that they were landed at Quebec, to all appearance in perfectly good order, and taken away by a carter, and conveyed, by the directions of a clerk of the respondents, to their store in the Upper Town of *Quebec*; the clerk not accompanying the carter. On opening the packages the clerk of the respondents found that this particular case, No: 14, did not require the use of a hammer to open it,—that it was fastened at one end by one nail only, and at the other by two, which offered

Several packages of goods were shipped at London to a merchant at Quebec, where upon the arrival of the vessel, and after delivery of the packages it was ascertained that some of the goods were missing from one of the packages. Notice not having been given until several months afterwards, it was thereupon held that the master was not responsible for the deficiency.

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but little resistance. The other nails appeared to the clerk to have been cut by a sharp instrument, and to have been recently done. No notice of this appeared to have been given by the respondents to the appellant : no survey was called, and no claim set up for the value of the goods missing until the following season, when the present demand was made and action brought. The bill of lading contained at its foot, the words, " contents unknown."

REID, CH. J. This action appears to have been instituted by the respondents, merchants in *Quebec*, against the appellant, master of the ship *Great Britain*, for the recovery of a sum of £110. 15. 10. being the value of certain goods and merchandize said to have been shipped by their agents, at *London*, on the 15th day of August, 1831, to the respondents, and packed in a certain case, No. 14, which, it is said, was broken open on board the said ship, and goods and merchandize to the above value pillaged and removed. The appellant has set up three points of defence to this action. 1. The want of proof that the particular goods in question were contained in the said case, at the time it was received on board the said ship. 2. The want of proof that this case, after it was delivered from the ship to the respondents on the wharf, at *Quebec*, was safely conveyed to the warehouse of the respondents, and there deposited in the same state and condition in which it had been so delivered. And 3, The want of any notice or demand on the appellant for loss or damage alleged to have been sustained by the respondents in relation to the said goods and merchandize, until the return of the said ship to *Quebec*, in the year 1832. In a case of this kind,

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where the right of a plaintiff rests upon the mere legal responsibility of a defendant,—where no personal fraud or collusion can be attributed to him,—the latter is entitled to avail himself of every point that can either diminish or destroy that responsibility. Now, it is certain that if the goods in question were not delivered on board the said ship, or if there be no proof of that delivery, which in law is the same, no responsibility can attach to the ship or master. In like manner, if the case has been delivered in the same state in which it was received on board the ship, but has passed through different hands before the damage was discovered, the presumption will be in favor of the master. The court, however, does not think it necessary in the present instance to enter particularly into the merits of these two points; and of the evidence adduced thereon, as they consider the other point of defence, namely, the want of notice to the appellant, after the delivery and receipt of the said case, during an unreasonable delay of several months, and after the departure of the ship from the port of delivery, as sufficient to exonerate the appellant. As the law has attached great responsibility to the master, and makes him liable not only for his own negligence or misconduct, but for that of others on board of his ship, so in like manner it extends to him a protection in the discharge of his duty consistent with the responsibility he thus incurs, and the nature of the trade in which he is employed. When a ship arrives at the port of delivery, the master necessarily has many objects which demand attention and dispatch, and as the interests of his employers require that his delay in port should be as limited as possible

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so it appears reasonable and necessary for the security, of all parties, that a consignee of goods, having any cause of complaint, either as to short delivery or injury done to those goods, should notify it without delay, that an opportunity may be given to the master to make the necessary inquiries to detect offenders, if pil- lage has been practised on board of his ship, or to make satisfaction for the loss. An immediate examina- tion into the facts and circumstances of the case is best calculated to ascertain the truth, and to secure the in- terests of all parties ; and as daily changes may occur, and the departure of the ship be uncertain, the neces- sity of such early precaution is strongly apparent. It is in evidence that the case in question was delivered to the respondents, in the same state and condition, as to outward appearance, as when received on board the ship ; and when the master of a trading vessel has de- livered the goods to the consignee, his duty is fulfilled, and his responsibility ceases. (a) This ought to ap- prize a consignee, that every instant of the time he allows to elapse after such delivery, without objection or complaint, carries a presumption with it in favor of the master that the goods were safely delivered, or that no blame is to be imputed to him. But after the defi- ciency here complained of was discovered, not only days, but months, were allowed to elapse, and the ship to depart before any objection or complaint was made,— the respondents in the mean time disposing of the goods without the usual precaution of a survey and examination of their state and condition when re- ceived. To attach responsibility to the master under

(a) Woolrich's Com. Law. p. 46.—Jones on Carriers, p. 91.—Emerigon. p. 679.

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such circumstances would be unjust, as he is, or may be, thus taken unprepared and unprovided with the means of defence he had in his power at the time of delivery. From the moment he delivers the packages he has received, according to his bill of lading, he is entitled to consider himself exonerated from all further responsibility, and consequently to give up any recourse he otherwise might have retained against his seamen, his passengers, or others, had he been apprized in due time of any claim or difficulty respecting what had been so delivered. It is inconsistent with the duties and obligations of the master of a ship, and would be injurious to this branch of commerce, that his responsibility should be continued for months and years after such delivery. The silence of the consignee in such a case is a presumption against him, and he cannot be allowed after so great laches to exercise a right which must inflict an unwarrantable injury on the master. The provisions of the French ordinance of 1681, on this point, are just and equitable. It directs that no action or demand can be maintained, on the part of the merchant or consignee, against the master for damages accrued to goods on board of his ship, if the consignee has received them without protest.<sup>(a)</sup> This is considered to be necessary for the ease and convenience of trade, and for the security of persons in it, that all contests and difficulties may be regulated without delay. The more modern commentators on this ordinance commend its decisions as of general benefit, and of great practical utility, <sup>(b)</sup> and

<sup>(a)</sup> Ord. 1681, liv. 1, tit. 12, art. 5. <sup>(b)</sup> 2 Pardessus No. 730. Ibid. tom. 1, No. 543. Poth. Charte Partie, No. 38.—2 Boulay Paty, p. 325.—Boucher, Institution au droit maritime, ch. 47, No. 2508-9.



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on this particular point, one of them observes, "il est  
 " intéressant pour celui qui a une action à former pour  
 " cause de dommage ou avarie, de faire ses diligences  
 " à tems pour en faire constater la nature, la qualité et  
 " l'estimation relativement aux circonstances, à l'effet  
 " de quoi il faut qu'il fasse faire la visite des Marchan-  
 " dises ou du navire, et qu'il fasse dresser un procès-  
 " verbal de leur état, partie présente ou duement ap-  
 " pellée."(a) Although no decision of the English  
 courts upon this question has been adduced, yet as  
 the general principles of law in all commercial coun-  
 tries, in relation to the duties of masters of trading  
 vessels, are drawn from the same source, have the  
 same objects in view, and are founded in reason and  
 justice, we must consider them as applying strongly  
 here in favor of the appellant, and to say that as the  
 respondents had received the case in question and re-  
 tained it, without giving notice to the appellant within  
 a reasonable time, of the loss and damage complained  
 of, they are not entitled to maintain their action against  
 him.

The judgment of the court below is reversed, with  
 costs to the appellant.

(a) Valin, liv. 1, tit. 12, art. 5 and 6 in notis.

## ON APPEAL FROM THREE RIVERS.

ANTOINE GADIOUX ST. LOUIS AND OTHERS, *Appellants.*  
and

AUGUSTIN GADIOUX ST. LOUIS AND PIERRE  
BENJAMIN DUMOULIN.....*Respondents.*

30th April,  
1834.

**J**UDGMENT of dismissal was rendered in the court below, in an action brought by the appellants, against *Augustin Gadioux St. Louis*, one of the respondents, for having in the month of November, 1831, contrary to the prohibition of the appellants, illegally cut a canal, commencing above a certain grist mill and carding and fulling mill of the appellants, on the river *Yamachiche*, and diverting the waters of that river from the said mills of the appellants, to a certain saw mill belonging to the aforesaid *Augustin Gadioux St. Louis*, situate on the said river *Yamachiche*, below the aforesaid mills of the said appellants; and in consequence the appellants prayed that such canal might be ordered to be closed, and the river and premises restored to the condition they were in before the making of the said canal. Thereupon this appeal was instituted. The declaration stated that so far back as the year 1820, the said *Antoine Gadioux St. Louis*, the elder, being then one of the co-seigniors of the fief *Grosbois*, did upon the refusal of the other co-seigniors thereof so to do, cause to be erected a grist mill within the said fief, with the knowledge of the said co-seigniors, and of the tenants of the said fief, on the great river of *Yamachiche*, be-

A seignior, by his grant from the Crown, acquires a right of property in the soil over which a river, not navigable, flows, but in the running water he has only a right of servitude while it passes through or before the land he retains in his possession, which does not authorize him to divert the stream, or use the water to the prejudice of other proprietors above or below him.

An action by a seignior against his co-seignior for the improper use of the common estate, can be maintained.

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ing a river not navigable; the waters of which river have since that time, until they were diverted by the said respondent, *Augustin Gadioux St. Louis*, as complained of in this declaration, caused the said mill to work by means of a dam across the said river, near the said mill, all which being upon the lands of the said *Antoine Gadioux St. Louis*, the elder: and which mill became at the time of its erection, and thenceforward had been, and still was a banal mill, grinding the corn of that part of the said fief. That shortly afterwards, to wit, in the year 1821, the said *Antoine Gadioux St. Louis*, the elder, caused also to be erected a carding and fulling mill in the same place, near the said grist mill, and upon the said river, the waters whereof in like manner thenceforward, down to the time of their being diverted, as complained of, worked the said last mentioned mill. That by a certain act *inter vivos*, bearing date the 18th day of January, 1826, and set forth in the declaration, three of the said appellants became proprietors of the aforesaid premises, with the land whereon they were erected, subject to an usufruct in favor of the said *Antoine Gadioux St. Louis*, the elder. After the return of the writ, the respondent *Pierre Benjamin Dumoulin*, by petition in intervention, alleged that the saw mill and canal complained of, were built by him jointly with *Augustin Gadioux St. Louis*, that the said saw mill and canal were their property *pro indiviso*, as partners, and prayed for leave to intervene and defend the said action, jointly with *Augustin Gadioux St. Louis*.

The respondents pleaded the general issue, and also by several pleas of peremptory exception, in bar to the action, 1. That the said *Pierre Benjamin Dumou-*

*lin* was seignior of the largest portion of the said fief, through which the river *Yamachiche*, not navigable, flowed, and that the saw mill and canal in question were held *pro indiviso* by him and several other persons of whom the appellants might form part, of which said river he the respondent was proprietor as seignior, the same being not navigable, whereby he had a right to use the waters of the said river, and to build the said mill and canal. 2. That the appellants had not a right of *banalité*, because many years previous to 1820, there was another grist mill in the seignior, which still existed for grinding the corn of the *censitaires*, and which had always been sufficient for that purpose. 3. That he the said *Pierre Benjamin Dumoulin* acquired the right of *banalité* within the *censive* by sheriff's sale, and by which sale he acquired undivided shares in the said seignior, from which he was entitled to use his rights and privileges in every part thereof as proprietor *pro indiviso, totum in toto et totum in qualibet parte*. 4. That the appellants as co-seigniors, &c. had not any right within the whole extent of the fief *Grosbois*, and if they had, at most it could only be in a part where they did not designate or allege that the disturbance,—*trouble*,—in question was committed. 5. That the appellants had not any right in the waters of the said river, even if they had acquired the right of *banalité*, beyond what was necessary for working their said mill: that there was sufficient water for both the mills, of the appellants and of the respondents, and that the respondents had used every precaution in taking of the said waters, only the surplus, after the appellants had been supplied.—To these grounds of exception the appellants fyled a

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general answer, and also by a special answer, pleaded that the grist mill mentioned in the said declaration was erected by the said *Antoine Gadioux St. Louis*, seignior as aforesaid, at the instance of the tenants —*censitaires*,—of the fief *Grosbois*, by reason of the neglect and refusal of all the other co-seigniors to erect and provide a good and sufficient mill on the said fief as appeared by several protests made on the 10th April 1820, by certain tenants of the said fief, against the said *Antoine Gadioux St. Louis* and others, co-seigniors.

The parties having been heard by their counsel, the opinion of the court was delivered by

SEWELL, CH. J. The general course of a river or rivulet cannot be diverted or altered without competent authority. This is the general rule, and he that claims a right to change it in any respect must shew his title to do so, because his claim is an exception to the general rule. The River *Yamachiche* whose waters have given rise to the action now before us is not a navigable river. It is, however, a rivulet included within the limits of the seigniory of *Yamachiche* and granted to the *seigneur* by the Crown of *France*. But although by this grant the *seigneur* acquires a title to the soil over which the rivulet in question flows, yet of the running water which constitutes the rivulet and is perpetually changing from one moment to another he is not and cannot be proprietor. In that he has and can have by law, no more than a right of usufruct or servitude while it passes through or before the land which he retains in his possession, a right which enables him to make use of as much as he may require of it for all necessary purposes, but does not authorize him to divert the stream or to use

the water to the prejudice of other proprietors above or below him. He can even conduct such portion of the stream as he requires for the amelioration of his property by canals or otherwise through the extent of the land which he occupies, but he must return it to the stream before it reaches the confines of his neighbour's estate. (a) In the present case the act complained of is the diversion of the water from the natural channel of the river before it has passed the lands possessed by the appellants, which is the superior estate, and before it reaches the confines of the estate possessed by the respondent, which is the inferior estate, and this the respondents have effected by digging a canal across a tongue of land which withdraws from the superior estate a certain portion of the water in its passage, and applies it to the service and benefit of the inferior estate of the respondents without the possibility of returning it to the channel of the river in any way that can render it of use or benefit to the appellants. It is manifest, therefore, that the legal right of usufruct or servitude to which the appellants are entitled, as to all the water of the river in its natural course through or before the land which they occupy, has been infringed. It has, however, been urged in argument, that the appellants and respondents being co-proprietors *par indivis* of the seigniorship of *Yamachiche* this action cannot be maintained,—but this objection is not founded. Whatever the rights of co-proprietors may be *par indivis* they

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(a) 4 Fréminville, 513. Arrêt, 12, Septembre 1671. Boniface, Tom. 4. liv. 9. tit. 2. cap. 4.—5. Pandectes Françaises, 376. 7 Merlin, Questions de Droit, 44. Ed. An. xiii. Grainville's Arrêts, 231. 232. 2 Henry's, 825. 3 Kent's Comment, 353.

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cannot justify the use of the common estate by one to the prejudice of the others, and there is a case in the *Journal des Audiences* in which this principle is thus stated, " L'un des deux co-propriétaires par indivis, peut bien se servir de la chose commune entr'eux, suivant l'usage auquel elle paroît naturellement destinée, pouvant même l'appliquer généralement à toutes sortes d'usages licites, que l'autre propriétaire n'a pas intérêt d'empêcher. Un co-propriétaire par indivis ne peut donc ni constituer ni acquérir par cette raison sur la chose commune aucun droit de servitude, qui en diminue l'utilité avec la liberté de l'autre co-propriétaire. Et conformément au même principe, celui à qui appartient un héritage voisin d'un autre héritage, qui lui appartient en commun et par indivis, n'a pas droit de faire écouler les eaux du premier de ces héritages en celui ci, au prejudice du co-propriétaire." (a)

For these reasons we are of opinion that the judgment of the court below must be reversed and judgment entered up in favor of the appellants, according to the conclusions of the declaration, with costs.

*A. Stuart and Black*, for the appellant.—*Duval*, for the respondent.

(a) 4 Jour. des Aud. 198. Arrêt, 3, Août 1689. Vide Merlin Questions de Droit v. Dénonciation de nouvel œuvre, § 6. p. 177 Ed. 1828. *Supra* 427. 564.

WILLIAM MEIKLEJOHN, Tutor, &c. .... *Appellant*,  
and

THE ATTORNEY-GENERAL of Lower }  
Canada and Sir JOHN CALDWELL... } *Respondents.\**

May 13th and  
June 21st,  
1834.

BY the 10th section of the Quebec Act, 14th Geo. III. c. 83, it was enacted, "That every owner of lands, goods or credits in the said province, who has a right to alienate the said lands, goods or chattels in his or her lifetime, by deed of sale, gift or otherwise, may devise or bequeath the same at his or her death, by his or her last will and testament, any law, usage or custom theretofore or then prevailing in the said province to the contrary thereof in anywise notwithstanding, such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England."

The provincial legislature of Lower Canada subsequently passed an act, 41st, Geo. III. c. 4. which, after reciting the 10th section of the Quebec act, and that doubts "and difficulties had arisen in this province touching the true intent and meaning of the said act in this respect," provided "that it shall and

The Quebec act having provided, that every owner of lands, goods or credits, who has a right to alienate the said lands, goods or chattels in his or her lifetime, may devise or bequeath the same, at his or her death, by his or her last will and testament, such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England. Held, that a will, invalid according to the

French law, and not executed according to the provisions of the Statute of Frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England.

\* Present: the Vice Chancellor, Mr. Justice Parke, Mr. Justice Bosanquet, the Chief Judge of the Bankruptcy Court, Sir E. H. East, Sir A. Johnson.



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may be lawful for all and every person and persons of sound intellect and of age, having the legal exercise of their rights, to devise and bequeath by last will and testament, whether the same be made by a husband or wife in favor of each other, or in favor of one or more of their children, as they shall see meet, or in favor of any other person or persons whatever, all and every his or her lands, goods or credits, whatsoever be the tenure of such lands, whether they be *propres*, *acquets* or *conquets*, without reserve, restriction or limitation whatsoever, any law, usage or custom to the contrary thereof in anywise notwithstanding : provided always, that it shall not be lawful for a husband or wife making such last will and testament to devise and bequeath more than, his or her part or share of their community or other property and estate which he or she may hold, or thereby to *prejudice* the right of the survivor, or the customary or settled dower of children ; provided also, that the said right of devising, as above specified and declared, shall not be construed to extend to a devise by will or testament in favor of any corporation or other persons in mortmain, unless the said corporation or persons be by law entitled to accept thereof. And whereas doubts have arisen touching the method now followed of proving last wills and testaments, made and executed according to the forms prescribed by the laws of England, before one or more of the judges of the courts of civil jurisdiction in this province : be it therefore further enacted, that such proof shall have the same force and effect as if made and taken before the court of probate."

Mr. Henry Caldwell, the proprietor of the seigniory of *Lauzon*, made a will, which commenced in these terms: "In the name of God; Amen. I, Henry Caldwell, Esq., of Belmont, near Quebec, being of sound mind and memory, blessed be God, and seeing the uncertainty of every thing in this world, do now make and publish this my last will and testament, hereby revoking all and every other will heretofore made." The whole of this will was in the testator's handwriting, but he had not subscribed his name at the end of it; it was attested by no witnesses, and there was no date affixed to it; but it was argued in the courts below, that as one of the legacies was to Mr. Bowen by the title of Attorney General, who was not appointed to that situation until 1808, that it must have been written subsequently to that year. All doubt, however, on the latter subject was removed by an affidavit of the testator's housekeeper, which was taken in England after the decision of the courts in Canada, and of which the appellants were admitted to the benefit, under an order of the judicial committee of the 7th December 1833. She deposed that she had seen the testator write the will a few months before his death (which took place on the 28th of May 1810); that he told her it was his will, and ordered her to lock it up in his escritoir, which she accordingly did.

The principal, and indeed the only question that was argued at length before the judicial committee, was as to the validity of this will to pass the seigniory of *Lauzon*. It was supported by the appellant, who appeared on behalf of Mr. H. Caldwell's grandson, who was a devisee under it, and opposed by the

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counsel for the crown, which had distrained upon the seigniority for a debt due to his majesty from Sir *John Caldwell*, the son and heir-at-law of the testator. The court of king's bench at Quebec, on the 16th of April 1827, decided that the will had neither been executed according to the laws of Canada nor to the forms prescribed by the law of England so as to pass the seigniority ; and this decision was confirmed by the judgment of the court of appeals on the 30th of July 1828, which was now appealed from.

Sir *Charles Wetherell* (K. C.) and *Knight* (K. C.), for the appellants.

This will is a good holograph will, capable of passing real estates by the law of France. The custom of Paris, by which the province of Lower Canada is governed, only requires, with regard to holograph wills, that they should be “*écrits et signés de la main et seign manuel du testateur.*” These last words are nearly identical with those of our Statute of Frauds, which requires that a will, to pass freehold estates, should be “signed by the party so devising the same.” The same mode of signature ought therefore to be held sufficient to satisfy the requisitions of both laws ; and it has long been established in our courts that the signature by a testator of his name at the beginning of a will, as in the present case, is, for the purposes of the Statute of Frauds, equally good as his subscription of it at the end, in the more ordinary method: *Lemarque v. Stanley*, (a). *Ellis v. Smith*. (b) The French courts have come to nearly similar decisions, as in the case of the Widow Voilain, reported

(a) 3 Levinz, 1.

(b) 1 Ves. jun. 1.

by *Denizart*, (a) where a holograph will was held good, although the whole of it was written upon the first page of a sheet of letter paper, between which there intervened two blank pages before the signature, which was on the 4th page. Another case, of a precisely similar nature, (b) is reported by the same author, which was decided in the same way, upon appeal, by the Châtelet of Paris. The want of date does not vitiate a holograph testament in Canada, although it would have done so in France under the old *régime*, on account of the provisions of an ordonnance of 1735 ; but it has been decided, after considerable discussions, in the case of the *Sieur Destouches*, (c) that this ordonnance did not extend to wills made in the French American colonies.

If this would not, however, enure to pass lands according to the law of France, still it was executed according to the forms of the law of England, so as to pass all copyhold and leasehold lands. There is nothing in the Quebec act to oblige the possessor of a seignior in Canada to observe in his will the forms required by the law of England to pass freehold property. It is a fallacy to say, that the absolute property of lands held under the custom of Paris is a freehold, for that is a species of property recognized only by the law of England. If it had been the intention of the framers of that statute to require the attestation of three persons to all wills of real estates in Canada, they surely would have inserted the word "attested," as well as "executed according to the forms prescribed by the law of England." Any

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(a) Verb. "Testament," No. 35.  
No. 36.

(b) *Denizart*, Verb. "Testament."

(c) *Ibid.* No. 30.

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doubts which formerly might have existed are, however, removed by the provincial act, which was passed expressly for the purpose of facilitating the exercising of the testamentary power. The last clause, indeed, clearly shews the views of the Canadian legislature, because it provides for the probates of wills, executed according to the forms prescribed by the law of England; but wills of freehold land, as is well known, require no probate, and the interpretation, therefore, which must be put on those expressions is, wills executed in such manner as is requisite by the law of England for passing personal property, or real property, not being freehold. This will is perfectly valid for either of the two latter purposes by English law, and therefore is valid for every purpose in Canada.

The Solicitor General (Sir C. Pepys) and *Wightman*, for the respondents.

There is no principle better established in the law of France, than that the signature of a testator must be affixed at the end of a holograph will, in order to denote that it is a complete and perfect instrument. *Pothier*, *Traité des Testaments*, cap. 1. sec 2. The two cases cited from *Denizart* are quite in accordance with this principle. What does the length of interval between the will and the signature signify, so that the signature is at the end of it?

The provincial statute was passed for the purpose of explaining all doubts as to the subject matter of Canadian wills, not as to the mode of executing them. Its effect is to enable the landholder to devise the whole of his real property to whom he pleases, instead of a part only of it, as was the case under the French law, not to empower him to dispense with the useful

formalities of either attestation or signature. The only question is, what is the meaning of the words, "forms prescribed by the English law?" and as there are no forms prescribed by that law as to the execution of wills of personal property, it is clear that they must mean those forms which it requires for passing of freehold property. This will, therefore, must, either according to the law of France or of England, be held invalid as to the estate in question.

Sir *C. Wetherell*, in reply.

The VICE CHANCELLOR. Their lordships are of opinion, that upon the true construction of the act 14th, Geo. III. c. 83. s. 10, a will disposing of lands or goods in Canada will be good if executed according to the law of Canada, which requires the same form for a will of lands as for a will of goods; and that a will disposing of goods in Canada will be good, if by the law of England it were sufficient to dispose of personal estate; but that a will disposing of lands in Canada, if it be not executed according to the law of Canada, will not be good unless it is made according to the law of England. The words of the section are, "executed either according to the laws of Canada or according to the forms prescribed by the laws of England." By the English law no form is required for making a will of personal estate, but the laws of England have prescribed certain forms for making valid wills disposing of freehold lands; and their lordships are of opinion, that those forms are referred to by the statute when it speaks of a will of lands executed according to the forms prescribed by the laws of England, and that the term "executed" comprehends the making, subscrib-

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ing and attesting, in the manner directed by the Statute of Frauds.

Their lordships are also of opinion, that the provincial act of 41 Geo. III. did not intend to alter, and has not altered, the law with regard to the form of making wills in Canada, but does, by the use of the words "devise or bequeath," and "whatsoever be the tenure of such lands," and by referring to a devise by will in mortmain, shew that the Canadian legislature considered the act of 14th, Geo. III. to refer to devises of land, technically so called in the law of England. It is plain, upon the cases and authorities which have been referred to, that the will in question, though holograph, and admitted to be final, was not signed according to the old law of France, which is the law of Canada, and requires that the signature shall follow the disposing part of the will ; and as an English will of lands, it is clearly null.

Therefore, without entering into the question of construction that might arise on the will, their lordships are of opinion that the judgment below must be affirmed, and the petition of appeal dismissed, with costs, to be taxed in the usual manner, as it is a petition of appeal against the judgment of the superior provincial court, affirming the judgment of the court below.

## ON APPEAL FROM MONTREAL.

BENJAMIN HART.....*Appellant.*

and

HENRY JONES AND ANOTHER.....*Respondents.*20th Nov.  
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**T**HIS was an appeal from a judgment dismissing the appellant's action to recover the value of three crates of earthenware from the respondents, who were forwarding merchants at Montreal and Brockville. Three crates belonging to the appellant were consigned to *W. J. Bell, of Perth*, and a receipt was taken for them from the respondents' clerk at Montreal, as being in apparent good order and condition. Upon the arrival of the goods at Brockville it was intimated to the appellant, by the consignee, that as part of them were much damaged he could not receive them, but held them subject to his orders. A survey was then made by two merchants at Brockville who signed a certificate of the damaged state of some of the goods. In the meantime the respondents intimated to the appellant, that they held the goods subject to freight.

If merchandise, in good order, is entrusted to a carrier, and arrives at its destination, in a damaged state, where he holds it subject to freight, he is liable for the value. And if he pretends that fraud or concealment has been practised, the *onus* of proof lies upon him.

SEWELL, CH. J. This is an action of damages against a common carrier in a boat in the usual course. The common law of Canada renders carriers liable for damage or injury to goods entrusted to their care, unless occasioned by the act of God, or the King's enemies. This is from the edict of the Prætor. By



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the French law this liability has not been carried to the same extent. It has created a third exception, viz. *force majeure* or irresistible violence. This latter constitutes the only difference between the law of bailments in *England* and in *France*. In all other respects they are perfectly similar. In both countries the law is founded on the broad principles of public policy, and according to it the carrier is to take as much care as a prudent man would use for his own family, otherwise he is answerable. The owner on his part must observe perfect good faith, if guilty of fraud, deception or concealment, the responsibility of the carrier ceases. Goods are to be put in proper condition for the journey, if not, the responsibility will also cease, but this requisite the carrier may dispense with. *Story*, in his law of Bailments states, "that the owner of the goods is bound to observe good faith towards the carrier, and to pack his goods, and to put them in a fit condition for the journey; and if he does not, he must bear any loss arising from his own neglect. But the carrier may himself, by implication, dispense with an exact performance of part of this duty, and assume upon himself the proper care of securing the property in a fit state for the journey." (a) There is one other principle to which it is necessary to advert; if the carrier pretends that there has been fraud, deception or concealment, the *onus probandi* lies on him, and he must shew that he is discharged.

(a) § 563. See *Beck v. Evans*. 16 East's R. 245. *Stuart v. Crawley*. 2 Stark. R. 324.

These principles which have been recognized in the court of king's bench for this district\* bear upon this case, and from the facts established in evidence I think it clear that the carrier is the person who must bear the loss. The appellant has proved the value of the goods to have been £23. 5.—that several of the crates were landed at Brockville in bad order—that when they were delivered to the defendants they were in the very best order; to the latter fact there is the

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\* BORNE *against* PERRAULT AND ANOTHER.

The defendants in this case were owners of a schooner navigating between Quebec and Montreal, and one of the defendants, *Naud*, was the master. In April a cargo of wheat was shipped in this vessel for Quebec by the plaintiff, and a bill of lading was signed by the master. With this cargo, and in company with several other vessels, he proceeded in safety to the head of the Richelieu Rapids, and as the river was there free from ice the other vessels in company proceeded on their voyage and arrived at Quebec in safety. *Naud*, on the contrary, cast anchor and immediately leaving the vessel in the charge of one man and a boy went on shore to see his family. He was absent for several hours, and during his absence a field of ice descending the river tore the vessel from her moorings and threw her on the shore where she bilged and was entirely lost with her cargo.

The owners of river craft are responsible for losses occasioned by their own want of care, attention or experience, or that of their servants.

*Per curiam.* Carriers of every description are necessarily trusted by their employers with the dominion and custody of their property, and the law therefore, for the sake of the public security, extends their responsibility to all accidents and losses by want of due care, attention or experience on their part or on the part of their servants. 1 *Domat, Lib. 1. tit. 16. sec. 2. art. 1. 2. 3. & 4. p. 160.* 2 *Jurisp. Consulaire*, 192-3, Nos. 9-10. 1 *Valin*, 373. The evidence before us in this case shews in the conduct of *Naud*, the master, a great want of that ordinary care and attention which he was bound to give. He anchored in a perilous strait, without cause, and at a moment when he might have proceeded to his port of delivery in safety. He left the vessel without any necessity when she lay in a position, which—if he had had any experience—he must have known to be one of great risk and danger when the ice breaks up, and he left in the vessel only one man and a boy who were not sufficient to get up the anchor or the sails when the field of ice was first seen descending, and as yet at a distance. We cannot but, therefore, attribute the loss of the schooner and her cargo to the fault of *Naud*, who, as one of the joint owners, must be responsible for his own misconduct and neglect, and as he was the *preposé* of *Perrault*, the other joint owner, *Perrault* must also be responsible. 2 *Toubeau Instit. Cons.* 280. 281. 282. 2 *Jurisp. Cons.* 192, No. 9. Judgment for the plaintiffs. Vide *Bruneau v. Cormier*, B. R. Q. 1816, No. 565. 1 *Domat*, 160, No. 4.

Vide Sir Wm. Jones' Law of Bailments, p. 103. See No. 3. *Locatio operis mercium vehendarum*.

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testimony of two witnesses. These gentlemen speak as to the custom at *Montreal* of the head carter of the forwarding merchant being sent to receive the goods for him, and then to examine them. Now, in addition to these two witnesses, we have the testimony resulting from the silence of the carter who received the goods, which affords a strong confirmation of their testimony. There is one other circumstance in evidence, that *Beckwith*, the clerk of the respondents, after the crates were delivered to them gave a receipt stating them to be in apparent good order. When the crates arrived at Brockville no notice of the damage was given to the appellant by the respondents. The consequence is, that the *onus probandi* lies upon the respondents to prove, as they have alleged, that the damage to the crates was not occasioned by their negligence. The crates when shipped in the respondents' boat were perfect, when they reached Brockville they were injured beyond one-half, and we have no exposition of any part of the circumstances of the case which would impose responsibility upon the shipper. The only remaining question for consideration is, as to the quantum of damages. The respondents have declared that they held the crates until payment of freight, and have disposed of them. A case very similar to this occurred in *France* in the year 1799, reported by *Merlin*, (a) where the court compelled the defendant to keep the article damaged and pay the value. The only difference between the cases is, that in the one cited the carrier was willing to restore the goods da-

(a) *Questions de Droit v. Voiturier*:

amaged, and in this he was not. The judgment of the court is for the sum of £23. 5. The expenses incurred by the appellant's book-keeper, on a journey to Brockville have been demanded, as a part of the damages sustained, but this the court considers too remote, and it cannot be allowed.

*A. P. Hart and Montizambert*, for the appellant.—  
*Duval*, for the respondents.

Judgment reversed.

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*Ex parte* THE HON. JOSEPH REMI VALLIERES DE  
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17th and 18th  
September,  
1834.

A Rule was obtained by *Polette*, on behalf of the Hon. *Joseph Rémi Vallières de St. Réal*, Resident judge for the district of Three Rivers, for a *certiorari* to His Majesty's justices of the peace for the district of Three Rivers, commanding them to send, under their seals, before this court, all convictions, sentences and judgments rendered by them, or any of them, against the applicant,—returnable on the 20th instant. The documents fyled in support of this application were,  
1. An affidavit of the applicant dated 13th Sept. 1834, in which it was stated that an indictment was found

In the court of quarter sessions a defendant makes affidavit of his intention to remove the indictment into the King's Bench, because it involved important questions of law, and because certain of the justices were personally interested in the

prosecution; thereupon he is ordered to shew cause why an attachment for a contempt against him should not issue; this he declines, but rests his case upon the prudence and discretion of the court, he is then declared guilty of two contempts, apprehended and imprisoned; held, that a *certiorari* will not lie to remove his conviction.

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against him and *William Henry Vallières de. St Réal*, on the 11th July last, for a nuisance, before *Joseph Badeaux*, acting as a justice of the peace for the district of Three Rivers, and *Benedict Paul Wagner*, and *James Dickson*, Esquires, justices of the peace for the same district, then holding or pretending to hold the court of general quarter sessions of the peace. That on the 20th of the same month the deponent appeared personally before the court of quarter sessions, and moved upon an affidavit, then fyled, that a day might be assigned on the first day of the then next sessions, to plead to the said indictment, which motion was granted; and the said affidavit, bearing date the 12th day of July, the deponent averred to contain the truth. That on the said 11th day of July, the said *Joseph Badeaux* was not by law qualified to act as a justice of the peace, and that then and since, he was and is inimical to the deponent, and determined to vex, harass and oppress the deponent under color of justice, and the powers unlawfully assumed by him as a justice of the peace. That on the 16th of the same month, the said *Joseph Badeaux*, *Benedict Paul Wagner*, and *James Dickson*, acting or pretending to act as justices, as aforesaid, adjudged the deponent to be guilty of a contempt, as well in making and fyling the said affidavit, as in refusing to shew cause in justification of himself, and then condemned him to imprisonment for the space of one hour. That the deponent believed the said *Joseph Badeaux*, *Paul Benedict Wagner* and *James Dickson*, to have been actuated by malice in pronouncing the said condemnation, and that they had not at any time any reasonable or probable cause to suppose him guilty of any contempt. 2. A copy of the indictment above

referred to. 3. The affidavit referred to in the foregoing affidavit to the following effect: "That at or about the time laid in the said indictment, the deponent did cause and procure the road or king's highway in the said indictment mentioned, to be widened and made straight or nearly so, in such manner that the said road was made to run across the land of *Mary Ann Esther Nelson*, whose agent he is and then was, and who then represented and now represents some one of the persons across whose lands the said highway is directed and ordered to be opened by the *procès verbal*, of the said highway, dated the fourth day of October 1799, and homologated by this court on the twenty-eighth day of the same month. That in widening and rectifying the said highway, the deponent also removed the same conformably to the said *procès verbal*, to the distance of more than fifty feet from the precipice or banks of the river *St. Maurice*, and that previous to and until the aforesaid acts of this deponent, the said highway did run in a curve and oblique line over the said land of the said *Nelson*, and at a less distance than fifty feet at one place, or more, from the precipice and bank of the river *St. Maurice*, and without any railing, contrary to the said *procès verbal*, and to the rights of property of the said *Nelson*. And this deponent further saith that his aforesaid acts were done by him in concert with *William Kent*, the proprietor of the adjoining land and representing *Moses Hart*, also named in the said *procès verbal*, which the said *William Kent* had long before requested, and did then request this deponent to make the said highway straight from curve and oblique, and promised this deponent to open the said highway on his land so as to correspond

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with the highway so widened, rectified and removed by this deponent, which promise the said *William Kent* has accomplished in part. That the aforesaid acts of this deponent are the same for which he now stands indicted in this court as for a nuisance. That the said highway across the land of the said *Nelson* has been rendered by the said acts of this deponent, and is now in consequence of those acts wholly conformable and agreeable to the requirements of the said *procès verbal*, and of the road act 36, Geo. III. cap. 9, which before it was not. And lastly, this deponent saith, that *Benedict Paul Wagner* and *James Dickson*, Esqrs. two of the sitting magistrates in this court, are proprietors of lands lying contiguous to the said highway, and are personally and especially interested therein. Also that several justices of the peace residing in this town are the personal enemies of this deponent, and prejudiced against him, and that in his defence on the said indictment, involving important questions of property and other difficult questions of law, this deponent is apprehensive full and equal justice would not be done in this court, between our lord the King and himself, and he is therefore resolved to sue out a writ of *certiorari*, without loss of time, for removing the said indictment into his Majesty's court of King's Bench for the district, in order that his trial thereon may proceed in that court." 4. An order of the court of quarter sessions, bearing date the 14th day of July 1834. Present, *Joseph Badeaux*, *Benedict P. Wagner* and *James Dickson*, and signed by the two latter, whereby it was ordered that the said *Joseph Rémi Vallières de St. Réal*, do shew cause before this court, on the sixteenth day of July instant, at eleven of the clock in

the forenoon, why he should not be proceeded against by this court as to law and justice may appertain, for a contempt of this the said court, for having in a certain affidavit fyled and put on record by him the said *Joseph Rémi Vallières de St. Réal*, in the said cause, made, inserted the following words and expressions, to wit: "And lastly the deponent saith that *Benedict Paul Wagner* and *James Dickson*, Esqrs. two of the sitting magistrates in this court are proprietors of land lying contiguous to the said highway; and are personally and especially interested therein; also that several justices of the peace residing in this town are the personal enemies of this deponent, and prejudiced against him; and that in his defence on the said indictment,—involving important questions of property, and other difficult questions of law,—this deponent is apprehensive full and equal justice would not be done in this cause, between our sovereign lord the King and himself." Whereupon the said *Benedict Paul Wagner* and *James Dickson*, two of the sitting justices, here now personally present, desire and order that the following statement and declaration by them made and signed, and now openly read in court, be fyled of record in the said cause, and inserted in the register of this court. "We the undersigned justices of the peace, in and for the district of Three Rivers, and sitting justices in the said court, on the twelfth day of July instant,—when in a certain cause then before the said court, between our sovereign lord the King, and the Hon. *Joseph Rémi Vallières de St. Réal*, for a nuisance, the said defendant fyled an affidavit, setting forth that we were personally and especially interested in the highway then and

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“ there in question,—do now say and aver here in open  
“ court, that we are in no wise interested in the issue  
“ of the said cause, but on the contrary free and unbi-  
“ ased in our sentiments, both as individuals and as  
“ justices of this court.” 5. The following entry in  
the same case dated the 16th day of July 1834: “ The  
said *Joseph Rémi Vallières de St. Réal* appears person-  
ally in court, and being asked what cause he hath or  
can show, why the rule made on Monday the four-  
teenth day of July instant, should not be made abso-  
lute? He answered and saith, that he doth not deem  
it necessary or proper to show any cause upon the said  
rule, and that he rests his case upon the discretion and  
prudence of the court. The said *Joseph Rémi Val-  
lières de St. Réal* then withdrew. The court then ad-  
journd for one hour *eodem die*. at twenty minutes past  
and after twelve of the clock, noon.” 6. An order of  
the court of the same day, present the justices above  
named, whereby it was adjudged that the refusal of  
the said *Joseph Rémi Vallières de St. Réal*, to show  
cause upon the said rule, was an additional trespass  
and contempt, by him committed in the face of the  
court; and moreover, that the said rule should be  
made absolute. It is therefore adjudged that the said  
*Joseph Rémi Vallières de St. Réal* was guilty of a tres-  
pass and contempt, by him committed in the face of  
the court, as well on the twelfth day of July, instant,  
as on this day; and thereupon all and singular the pre-  
mises being seen and fully understood by the court,  
it was considered that the said *Joseph Rémi Vallières  
de St. Réal* be forthwith apprehended in his body, and  
be imprisoned in the common gaol of this district for  
and during the term and space of one hour, and that

upon the expiration of the said term and space, he be discharged.

*A. Stuart* was heard in support of the rule, and *H. Judah* and *Wagner* in person, contra.

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The points made for the applicant were in substance, 1. That the affidavit complained of appeared to have been fyled in the regular course of a judicial proceeding, and involved no reproach or disrespect towards the court of quarter sessions, and did not appear to be accompanied by any circumstance changing its intrinsic character, nor was it found by the quarter sessions to have been produced for a contumelious purpose, nor indeed for any other purpose than that for which it has relation. 2. That so far as the alleged contempt in the affidavit is concerned no circumstance is found *dehors* the affidavit to give to the words therein a contemptuous import, which of themselves they have not; and that the finding of the contempt was therefore without premises and the conviction irregular and insufficient upon its face. 3. That the same objections lay as to the alleged contempt in not shewing cause, &c. 4. That if the foregoing positions were true, then the court of quarter sessions had exceeded its jurisdiction, and that the proper remedy was as here, by *certiorari*. If contempts be an exception to the general rule, that *certiorari* shall lie in all cases of summary conviction where an inferior court exceeds its jurisdiction, unless taken away by statute, or unless there be a subsisting right of appeal from the conviction; then it was for the party supporting the conviction to shew such exception, which could not be done; on the contrary, all the authorities went to shew, that on a conviction

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for a contempt by an inferior court, if such conviction did not shew wherein the conviction consisted, the conviction was bad, which proves that the superior court can inquire and determine whether the facts found amount to a contempt or not, and that the case in *Ventris*, (a) and cited in *Viner* as law, was in point. The celebrated case of *Bushel* (b) might also be referred to where the commitment by a court of Oyer and Terminer of a juror who was fined forty marks by reason of his verdict in a criminal trial before that court was considered as a nullity and the party discharged upon *habeas corpus*. That the case of *The King v. Woodland* (c) went some length to shew that when the sessions had stated all the facts particularly, and drawn an improper conclusion, a superior court had a right to inquire into the propriety of such conclusion. 5. That if a contrary doctrine to that last stated were maintained and constructive contempts allowed in the inferior courts without any power of supervision or control on the part of the superior

(a) In an *habeas corpus* and *certiorari* for the body of J. S. who had been imprisoned for not paying of a fine of £20. set at the quarter sessions, the return was, that he being constable, and demanded by the court to present an highway, which was sworn before him by two witnesses to be out of repair, said in contempt of the court, that he would not present it; for which and certain other contemptuous words the fine was set.

The counsel for the prisoner moved that it might be fyled, which was done.

The court were of opinion, that the fine was not well set; for constables are to present upon their own knowledge, and the two witnesses should have been carried to the grand jury; for the constable was not obliged to present upon their testimony. This court is to judge of their fines, whether without cause or to mitigate them when excessively imposed; and for the contemptuous words the return is ill, because not expressed what.

On the other side it was prayed, that the return might be amended, for he had spoken opprobrious words; but that could not be admitted after the fyling. And so the party was discharged. 1 *Ventris*' R. 336. *Viner*'s Abr., Contempt, C. 3. (b) *Vaughan*'s R. (c) 1 T. R. 261.

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courts, the inferior courts could extend their jurisdiction indefinitely *ad libitum*.

SEWELL, CH. J. We have before us an application, by motion, for a writ of *certiorari* to the court of quarter sessions of this district, to remove a summary conviction in that court, by which the Hon. *Joseph Remi Vallières de St. Réal* was declared and adjudged to have been guilty of a contempt in the face of the court. There are various means provided by law for the revision of the proceedings of inferior jurisdictions, but of these, upon the present occasion, it is only necessary for us to refer to the writs of appeal and *certiorari*. By the former the proceedings of the court below are brought before the superior tribunal, with the evidence on which their judgment is founded, and the judges take into consideration the facts of the case and decide upon the merits. The writ of *certiorari*, on the contrary, enables the court above to examine the proceedings of the court below, and to decide whether they are or are not correct in point of law, but does not enable them to investigate the facts. They may inquire whether the information sets forth a cause of complaint, which by law, is cognizable in the court below, and whether the proceedings against the defendant have been such as the law requires. Whether he was duly summoned and (if he appeared) had a day to plead, and permission to produce, and examine his own witnesses, and to cross-examine those who were heard in support of the charge; but they cannot inquire into the facts, or even take into their consideration the merits of the case, and therefore cannot examine or determine whether the deductions which the court below has drawn

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from the facts in evidence before them are correct. In the case of *The King v. Reason* the court said, "The evidence is *entirely and exclusively* for the consideration of the justices below," (a) and in the subsequent case of *The King v. Smith*, Lord Kenyon, after observing that where the magistrate who convicts has drawn his conclusion from the evidence before him, the court above cannot examine the propriety of his conclusion, immediately adds, "for the magistrate is the sole judge of the weight of the evidence." (b) As we have no power to investigate the merits in cases of ordinary convictions brought before us by *certiorari*, it must be plain *a fortiori* that the same rule must obtain upon convictions for contempts. In the case of *Bruss Crosby*, Lord Chief Justice De Grey said, "That every court must be the sole judge of its own contempts." (c) And he particularly mentions commitments by the court of admiralty and by the ecclesiastical courts for contempts, and observes that even the courts of Westminster Hall never interfere with them. The case before us is thus narrowed to one point, can the court of quarter sessions commit for contempt in the face of the court? To shew that they can I shall cite, perhaps unnecessarily, a single authority; "The justices assembled in general or quarter session, have an undoubted power to commit for any contempt in the face of the court for the period of their session, for this is a power incident to every court of justice." (d) Upon these grounds this application cannot be granted.

(a) 6 T. R. 375.

(b) 8 T. R. 590.

(c) 11 State Tri. 337.

(d) Dickenson's Guide, 47. 48. 3rd Ed. also Ch. Crim. Law, 631, and authorities there cited.

**BOWEN, Justice.** It is scarcely necessary to add any thing to the opinion delivered on behalf of the court by the learned Chief Justice. The law of the case does not appear to admit of doubt. This court does not sit as a court of appeal to *revise* the judgments of the quarter sessions. Every court is by law constituted the sole judge of *its own* contempts, particularly of contempt committed in the face of the court. The authorities upon this subject are numerous and conclusive. As to the facts of the case so far as they have been disclosed by the affidavits in support of this application for a writ of *certiorari*, if I had an opinion to express upon them, it would be, that the affidavit made by the defendant in the court below, contains no offensive matter whatever; the grounds stated in it for putting off the trial are such as usually form the basis of similar applications, namely, that upon the trial of the indictment preferred against him for a nuisance and obstruction of the king's highway, titles to lands and questions of law, intricate in their nature, will be submitted—questions which cannot so advantageously be tried in the quarter sessions as in the court of king's bench. The affidavit of the defendant further states, that two of the magistrates then upon the bench of the quarter sessions, are personally interested in the road in question, (a fact, however, which it would appear they have denied upon the record.) The affidavit likewise alleges that several justices of the peace residing in Three Rivers are the personal enemies of the honorable judge, and consequently that he could not expect to have a fair trial in the quarter sessions. This court has already considered that affidavit so made as sufficient for the

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purpose, and has ordered a writ of *certiorari* to remove the indictment for nuisance into this court for trial. Had I been upon the bench of magistrates, it certainly would not have entered into my mind to consider such an affidavit a contempt of court. That tribunal, however, thought otherwise, and acted accordingly. I do sincerely regret, that the honorable judge did not see fit to employ counsel, instead of appearing before the bench of magistrates in person, as well upon his application to put off the trial as upon the rule for an attachment for contempt ; had he done so, and it had been stated that no contempt was intended, instead of declining to shew cause and contenting himself by declaring, "that he did not deem it necessary or proper so to do, resting his case upon the discretion and prudence of the court ;" it is to be presumed, the rule for an attachment would have been discharged. Nor can I, even in this answer, see grounds for an attachment ; nevertheless, the court of quarter sessions viewed the matter in a different light ; and as it must be allowed to be the sole judge of its own contempts, the relief now prayed for, to remove the *conviction* by *certiorari*, cannot be granted. The motion must therefore be disallowed.

GALE, *Justice*. It is not my intention, nor do I see the necessity of adding any further observations upon a matter which has been so amply dilated upon ; at the same time it may not be improper for me to express my entire concurrence in the judgment rendered, and in the opinions already adduced in support of it by the judges who have preceded me.

Motion denied.

JOSEPH DONEGANI.....*Appellant.*  
 and  
 JEAN ANTOINE DONEGANI AND OTHERS.....*Respondents.*

2d February,  
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**THE VICE CHANCELLOR.**—In this case it appears that *Jean Donegani* a native of *Moltrazio* in Lombardy, and *Marie Galla*, his wife, who was also an Italian by birth, in the year 1794, went to *Montreal*, for a temporary purpose, and left it in 1802. They had three sons *Joseph*, *John* and *Daniel*, and a daughter *Theresa*, all of whom were born in *Lombardy*. In September 1797, *Theresa* married. The respondents are the three children of that marriage, and were all born at *Montreal*. In 1807, *Theresa* died at *Montreal*. In 1809, *Jean Donegani*, her father, died in *Lombardy*, and in 1815, his wife died there also. *Jean Donegani*, during his residence at *Montreal*, acquired some real property there: he died, leaving a will and codicil professing to give all his real property to his three sons. Upon his death, his son *Joseph* took possession of all his real property at *Montreal*, and continued in quiet possession till the year 1827, when the respondents commenced the proceedings to recover it, which gave rise to the present appeal. The respondents alleged that *Joseph* had taken possession of personal property be-

Who is an alien? is a question to be decided by the law of England, but when alienage is established the consequences which result from it are to be determined by the law of Canada.

If an alien dies, without issue, his lands belong to the Crown, but if he leaves children, some born in Canada, and others not, the former exclude the Crown, and then all the children inherit as if they were natural born subjects.

Where an alien has a son who is also an alien, the children of the la-

ter inherit from the grand-father to the exclusion of their father.

Although an act of the legislature passed after judgment rendered in a court of original jurisdiction may affect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of in an appeal from the judgment.



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longing to his father, and real and personal property belonging to his mother, and that property also, the respondents claimed. But it does not appear that there was any such property, or any other than the real estate acquired by *Jean Donegani* at Montreal; and the judgment that was given by the court below related only to the real estate of *Jean Donegani* at Montreal. The court, in effect, decided in favor of the respondents, and by a decree dated 18th June 1831, directed restitution of the estate to them, with all the intermediate profits. The appellant appealed to the court of appeals in Lower Canada, and the judgment below was affirmed by a decree of 30th April 1832. From that decree the present appeal has been brought before his Majesty in council.

It is said that the judgment complained of is wrong, because it is alleged that the law of *Canada*, at the time these proceedings took place, was not the old law of *France*, including as part of it, the *droit d'aubaine*, and even if that were the law, yet under the circumstances above stated, the respondents were not the persons entitled to inherit the real estate of their grandfather to the entire exclusion of their uncles. That the law of *France*, was in general the law of *Canada*, as one of her colonies, before its cession, cannot be disputed.— It appears from the edicts of *Louis XIV.* published in *March* and *April* 1663, that after the company of *Canada* had ceded to the French King the colony of *New France*, called *Canada*, *Louis XIV.* appointed a sovereign council in *Canada*, giving them power “*pour y juger souverainement et en dernier ressort selon les loix et ordonnances de notre royaume.*”(a) But it is said

(a) 1 Edits et Ordon. 23.

the *droit d'aubaine* was no part of the French colonial law, and to prove this a passage from *Pothier* was quoted, "La nécessité de peupler nos colonies a engagé nos rois à naturaliser tous les étrangers qui s'y transporteraient dans la résolution d'y former un établissement fixe et durable."<sup>(a)</sup> And it is said that this passage, when taken in connection with the paragraph immediately preceding it, shews that all strangers in French colonies, were naturalized generally, and as of course without the grant of letters of naturalization to individuals from time to time. But that this is not the true construction of the phrase, "*a engagé nos rois*" is evident from the edict of October 1727, "Les étrangers établis dans nos colonies, même ceux naturalisés, ou qui pourront l'être à l'avenir." And a similar expression occurs in the third article, "autres personnes, qui soient étrangers, encore qu'ils soient naturalisés." In the edict of August 1717, which established a company in Canada, under the name of "La compagnie d'occident," the 23d article is thus "voulons que ceux de nos sujets qui passeront dans les pays concédés à la dite compagnie, jouissent des mêmes libertés et franchises que s'ils étaient demeurants dans notre royaume, et que ceux qui y naîtront des habitants François du dit pays, et même des étrangers Européens, faisant profession de la religion catholique, apostolique et romaine, qui pourront s'y établir, soient censés et réputés régnicoles, et comme tels capables de toutes successions, dons, legs, et autres dispositions, sans être obligés d'obtenir aucunes lettres de naturalité."<sup>(c)</sup> There is

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(a) Tr. des Personnes, tit. 3, sec. 3, vol. 8, p. 1. Ed. 1827. (b) 1 Edits et Ordon. 475. tit. 6. art. 1. 3. (c) Edits et Ordon. 366. art. 23. lb. p. 37.

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a similar passage in the 34th article of the edict of *May 1664*. *Denizart* lays down the law in this manner, "Partout où les Français ont des colonies, l'on suit la Coutume de Paris. Nous avons dit au mot *aubaine* que le droit d'*aubaine* n'est point aboli dans les colonies. Il s'y exerce en son entier à l'égard de toutes les nations étrangères. Michel Etienne de Vaux, originaire Français, mais naturalisé Anglois, étant décédé en voyages, ses effets furent mis en dépôt à l'amirauté de Louisbourg, Sa fille les reclama: l'affaire fut portée au conseil du roi, la confiscation fut ordonnée par arrêt du 13 Mai 1743." (a) Their Lordships are of opinion that nothing advanced by the appellant's council, has shewn that the general law of France, including the *droit d'aubaine*, was not the law of Canada at the time it was ceded to the English, and whatever might have been the effect of the proclamation of the 7th October 1763, there can be no doubt that, since the act of 14th Geo. III. cap. 83, the Canadian law is the old French law, including the *droit d'aubaine*, and has been the law that governed Lower Canada. The cession of Canada to the English, of course, varied the law of alienage in one respect, namely, in respect of the sovereign of the country. When the King of England became King of Canada, the natives of Canada became his subjects, Canada became part of the dominions of the English Crown, subject to be governed by its local laws. Italians, and others who were born out of the allegiance of the King of England, became aliens in Canada. By the change in sovereignty it happened that the law of England, and

(a) Vol. 4. Ed. 1784, p. 610. 12. v. *Colonies Françaises*, § 2. 8.

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not the law of France, would of necessity determine the question, who were aliens or not. But when the fact of alienage was established, according to the English law, the civil consequences of alienage would be determinable by the local or the Canadian law. The question then arises what was the *droit d'aubaine*? *Denizart* says, (a) " Le droit d'*aubaine* est un droit de la Couronne, " en vertu du quel le Roi succède aux étrangers qui " laissent des biens dans le royaume. * * La seconde " espèce d'*aubains* étoit les personnes qui, nées dans " un pays étranger, venoient s'établir dans le royaume. Les étrangers sont incapables de succéder " et de recevoir par testament. Enfin ils sont incapables de transmettre leurs successions soit *ab intestat*, soit par testament ; si ce n'est à leurs enfans " et descendans regnicoles, par exception à la règle " comme on le verra §, 6. * * * Pour savoir si les " biens qu'un étranger laisse en France, à son décès, " sont acquis au roi par droit d'aubaine, on ne considère point s'il est décédé en France ou hors du royaume. (b) L'usage a introduit une exception générale " à la règle qui déclare l'aubain incapable de transmettre sa succession. Cette exception regarde les " enfans et descendans de l'aubain, nés et domiciliés " en France. * * Si l'étranger a des enfans qui soient " nés, les uns en France, les autres hors le royaume, " ceux qui sont nés en France habilite leurs frères " étrangers pour succéder au père commun. Les premiers ne sont pas recevables à opposer aux autres " le vice de pérégrinité. Quoique les enfans soient " admis dans les cas dont on vient de parler, à la succession de leurs pere et mere, ceux-ci ne succèdent

(a) Vol 2. tit. aubaine, 576, 577, 580. (b) 2 L. C. Den. 582. 589. § 6, p. 1.

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“ point à leurs enfans ; la réciprocité n’a pas lieu à
 “ cet égard.” The same propositions are to be found
 “ in passages that have been cited to us from the *Dic-*
tionnaire des Domaines p. 141. *Lefevre, Traité du*
Domaine, Chabot de L’Allier, Brodeau sur Louet, Le
Brun, and Poullain Duparc, Principes du droit Fran-
çais.(a) “ Les descendants de l’aubain au second dé-
 “ gré, ou dans un degré plus éloigné lui succèdent,
 “ s’ils sont regnicoles ou naturalisés, quoique leur père
 “ soit vivant et aubain.” *Traité du Domaine de Lefe-*
vre, speaking of the same rule, says, “ Elle s’appli-
 “ quera non seulement aux enfans du premier degré,
 “ mais même aux petits enfans nés dans le royaume,
 “ le père vivant ou mort.”(b) It appears to their
 Lordships from the passages quoted, that according to
 the *droit d’aubaine*, if a foreigner died, leaving lands in
 France, his lands would belong to the King, unless he
 had a child or other descendants born in France. If
 he left several children, some born in France, and
 others not, those who were born in France would ex-
 clude the King from taking, and the consequence was
 that, as he was excluded, all the children would take
 in the same manner as if all had been born in France,
 and if the foreigner left a son born out of France, who
 had children born in France, in that case the grand
 children would inherit to the grand father, to the ex-
 clusion of their father. It is said that, if the grand
 children of *Jean Donegani* could take by reason of the
droit d’aubaine, then the appellant, as their uncle,
 ought to share with them in the same manner, as he
 would have done in case *Theresa* had been born at
 Montreal, and had survived her father. This objec-

(a) Vol. 2, p. 20.

(b) p. 127. note b.

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tion seems to be an after thought; no such point appears to have been noticed in the pleadings. The appellant relied on his title under the will and codicil; The respondents on their title as heirs under the *droit d'aubaine*. No authority has been cited to shew that the alien son could share with the natural born grand children, in the same manner as he could have shared with the daughter, if she had been a natural born subject. If *Theresa* had been living at the death of her father her children would have taken in exclusion of her. She could not share with them, and if she could not, analogy seems to require that her brothers should not share with her children. Their Lordships *primâ facie* must give the judges of the court below, credit for knowing their own local law, and it lies upon the appellant to shew by something more than mere assertions, that the judgment complained of is wrong.

It was lastly said that, under the provincial statute 1st Will. IV. the appellant is entitled:* that act, though

* The first clause of this statute, (1st Will. IV. cap. 53.) enacts in substance, "that all persons who have at any time received grants of land in this province from the Crown, and all persons who have held any public office in the province, under the Great Seal, or the seal at arms, and sign manual of the governor, and all persons who have taken the oath of allegiance, and all persons who had their settled place of abode in this province before the year 1823, and are still resident therein, shall be, and are thereby admitted and confirmed in all the privileges of *British* birth, and shall be deemed and taken to be, and so as respects their capacity at any time heretofore, to take, hold, possess, enjoy, claim, recover, devise, impart or transmit any real estate in the province of Lower Canada, or any right, title, privilege or appurtenance thereto, or any interest therein, to have been, natural born subjects of His Majesty, to all intents, constructions and purposes whatsoever, as if they and every of them had been born in His Majesty's United Kingdom of Great Britain and Ireland, and that the children or more remote descendants of any person of either of the foregoing descriptions who may be dead, shall be and are thereby admitted to the same privileges which such parents or ancestors, if living, could claim under this act." Provided nevertheless, that any of the persons above described, (except females,) who have not taken the oath, shall not be entitled to the benefit of the act, unless he shall have taken the same before some person duly authorized to administer it.

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assented to by his Majesty on the 12th of April 1832, was not signified by proclamation till the 5th of June 1832. The question before us is whether the court of appeals below was right in holding that the judgment pronounced in June 1831 was right. That judgment must have been right or wrong, according to the state of the law at the time it was pronounced, and, though the provincial act may have had the effect of giving to the appellant, as against that judgment, rights which he had not before, yet whatever may be the operation of that act, no facts appear upon the record which can enable their Lordships to say that the appellant has any title under it. Upon the whole their Lordships are of opinion that the petition of appeal ought to be dismissed with costs.

By the second clause,—persons actually domiciled in this province on the 1st day of March 1831, not being of the description of persons above mentioned, and who may have resided seven years continually, in this, or any of His Majesty's dominions, are taken to be, so far as respects their capacity to hold real estate, &c. natural born subjects of His Majesty, as if they had been born within this province. Provided that no one of this description of persons, (except females,) who at the passing of this act has been resident in His Majesty's dominions seven years continually, as aforesaid, shall be entitled to the benefits of this act, unless within three years from and after the passing of this act, if at the said passing of the act he shall be of the age of 18 years or upwards,—or if he shall not at the said passing of the act, be of the said age, then within three years after he shall attain the said age he shall take and and subscribe the following oath: “*I do swear that I have resided seven years in His Majesty's dominions, without having been during that time, a stated resident in any foreign country, and that I will be faithful, and bear true allegiance to the Sovereign of the United Kingdom of Great Britain and Ireland, and of this province, as dependant thereon,*” and that no one of the persons described in this clause, who has not been resident as aforesaid, seven years, continually in His Majesty's dominions, shall be entitled to the benefits of this act, unless within three years after he shall have completed a stated residence of seven years, continually as aforesaid, (if at the completing of such residence he shall be of the age of 18 years or upwards, or if at that time not of that age, then within three years after he shall have obtained that age,) he shall take and subscribe such oath.

By the remaining sections of this statute, the mode of registering the oath—the evidence of naturalization, &c. are established. The 9th section enacts, “that after the 1st day of January 1850, no further oaths shall be administered, or proceedings had for the purpose of being naturalized under this act.

RITCHIE *against* ORKNEY *et ux.*20th April,
1835.

The court of
Vice Admiralty exercises
jurisdiction in
cases of collision
infra corpus comitatus.

RITCHIE, master of the steamboat *Good Intent*, by a decree of the court of Vice Admiralty, bearing date the 9th day of December last, was condemned to pay to *Robert Orkney* and wife, owners of the sloop *John Esdale*, the sum of £118. for damages occasioned by the *Good Intent* in running against and sinking the said sloop then lying at anchor in the port of *Quebec*.

Duval moved for a prohibition to restrain further proceedings upon the said decree.

In support of the motion it was contended, that the admiralty had not jurisdiction, as the cause of action arose within the precincts of the county of *Quebec* and not upon the sea, (a) the courts at *Westminster* having invariably, in such cases, granted a prohibition. The motion in this case is made after judgment pronounced in the vice admiralty, but as the want of jurisdiction appears on the face of the libel a prohibition will lie. (b) It may be said, that the imperial statute, 2nd Will. IV. c. 51, gives jurisdiction to the court of vice admiralty. But that statute applies to a case where *the cause of action has arisen out of the local limits of the vice admiralty court*. What is meant by "local limits"? if we are to understand by that expression the limits of the pro-

(a) Com. Dig. Admiralty E. 1. 3 Black. Com. 106. 4 Evan's Stat. 271. And *supra*, *Hamilton v. Fraser*, 21.

(b) *Ladbroke v. Crickett*, 2 T. R. 649. Cowper R. 424. Douglas R. 377.

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vince of Lower Canada, then the statute does not apply to the case, for here the cause of action arose *within* the limits of the province and within the county of *Quebec*, where this court exercises jurisdiction daily. It is impossible to define the expression "local limits" so as to give the court of vice admiralty jurisdiction in this case, nor is there any reason why it should. Why grant to a subordinate authority a power which has been expressly refused to its superior? The court of admiralty cannot, in England, extend its jurisdiction to such a case as the present. Moreover, this statute was passed, not with a view of conferring jurisdiction in cases in which the existing law denied it, but to remove doubts which might exist where the cause of action did not arise within the "local limits" of the vice admiralty court and for this there is great reason, as in the case of a sailor who proceeds *in rem* against the vessel for his wages, if this recourse were denied, in most cases he would lose them. In the case of *Murphy v. Wilson* this court denied the jurisdiction of the vice admiralty, because the cause of action had arisen in a foreign port. (a)

*Aylwin*, contra.

SEWELL, CH. J.—I have carefully perused the Imperial Statute, upon which this application for a prohibition to the court of vice admiralty is founded, and I confess that I find it obscure. It is, however, the duty of this court and of all courts, to carry into effect the general object of a remedial statute, in all cases to which it can be safely applied, and as it is plainly the intention of the law giver, to give jurisdiction to the

(a) Vide *supra*, p. 39, in note.

court of vice admiralty in this province, in some case of collision, in which, before the statute was passed, it had no jurisdiction, and as there is but one instance to which the jurisdiction of that court, before the statute was passed, did not extend, namely, collision *infra corpus comitatus*, the statute must necessarily be held to apply to it so far as to give to the admiralty a concurrent jurisdiction with the court of king's bench, in cases of collision happening upon the river St. Lawrence, and within the body of a county. But I am by no means prepared to say that this court has been ousted of any portion of its jurisdiction in such cases, or that the statute intends to deprive the subject of the benefit of the trial by jury, to which he is entitled and can obtain in this court.

BOWEN, J.—There cannot be a doubt that this statute, which is intituled, “an act to regulate the practice and fees in the vice admiralty courts abroad, and to obviate doubts as to their jurisdiction,” was passed to remedy an inconvenience which existed a short time previous, and that the intention of the legislature was to afford a remedy against the ship itself, as well as against the master, the remedy against the latter proving in many cases insufficient. Notwithstanding the words “local limits,” the effect of the other words, whereby jurisdiction is given, cannot be destroyed.

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**APPEALS.**

1. The court of appeals may hear an objection not argued in the court of original jurisdiction. [*Scott v. the Phoenix Assurance Company.*].....354
2. An act of the Parliament of Great Britain declared that all laws passed by the legislature of a colony should be valid and binding within the colony, and directed that the colonial court of appeal should be subjected to such appeal as it was previously to the passing of the act, and also to such further and other provisions as might be made in that behalf by any act of the colonial legislature: Held, that an act having been passed by the colonial legislature, limiting the right of appeal to causes where the sum in dispute was not

less than £500 sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King in council, although there was a special saving in the colonial act of the rights and prerogatives of the Crown. [*Cuvillier v. Aylwin*.].....527

3. Although an act of the legislature passed after judgment rendered in a court of original jurisdiction may affect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of in an appeal from the judgment. [*Donegani v. Donegani*.].....605.

See "RELATIONSHIP."

#### ARBITRATION.

Upon a reference to three arbiters, or, specifically to any two of them, an award by two is good, if the third has had due notice of the matters referred and of the several meetings; but if the reference be to three generally, all should be present at the meetings, especially when the award is made, and then the award of two is valid, even if the third refuses to assent to it. [*Meiklejohn v. Young*.]...43

See "INSURANCE."

#### ARREST SIMPLE.

1. The court will quash an attachment by writ of *arrêt simple* whereby any other person, than the defendant in an action, is divested of possession of property.— [*Wood v. Gates*.].....536
2. If an attachment be issued to seize property in the hands of A. and under the writ the Sheriff attaches property in the hands of B. the seizure is null *propter defectum auctoritatis*, and the court will restore the property to B. without enquiring into his right or title to it. [*Lee v. Taylor*.].....538

#### ASSAULT.

In an action against the captain of a ship chartered by the E. I. C. for an assault and false imprisonment, a justification on the ground of mutinous, disobedient and disorderly behaviour sustained. [*Coldstream, Hall*.].....518

#### ASSEMBLY.

A person committed by the Assembly to the common gaol "*during pleasure*," is discharged by a prorogation. [*Ex parte Monk*.].....120

#### ASSIGNMENT.

See "BANKRUPTCY."

#### ATTACHMENT.

1. An attachment will lie against two persons, appointed by commission from the Crown to the office of sheriff, for the non-payment of monies levied by one of them, although the other may not have assumed the duties of the office, or acted in any manner under their commission. [*Black v. Newton*.].....298
2. A writ of attachment under the ordinance of 1787, may be set aside, 1. if it be not, in the language of that law, against the estate, debts and effects of the defendant, to be attached in the hands of some person in particular, and does not contain a summons to him, as well as to the defendant, to appear. 2. If it be accompanied by an injunction from the judge to the sheriff to retain the effects seized to abide the judgment of the court. 3. If it appears in the declaration that the debt sworn to has been cancelled. [*Richardson v. Molson*.].....376
3. If a motion to set aside an attachment, by the Sheriff, of books of account and papers, be rejected in a court of original jurisdiction, and its judgment to that effect be reversed in appeal, the court of appeals will not grant a rule for an attachment against a judge for putting a *scellé* upon such books and papers before they are restored by the sheriff to the person in whose possession they were seized, against the sheriff for delivering them to the judge for that purpose, or against the party and his attorney at whose instance the *scellé* was carried into execution.—*Ib.*.....393

See "EXCEPTION," "SCELLÉ"

#### BANKRUPTCY.

An English commission of bankruptcy operates, in Canada, as a voluntary assign-

ment by the bankrupt. The assignees, therefore, may sue for debts due to the bankrupt, or for his property, and may take the share of the proceeds of the bankrupt's estate which belongs to the English creditors, but such proceedings of the assignees cannot deprive the provincial creditors of any acquired rights or privileges as to the property of the bankrupt, or the proceeds thereof, to which they, by the law of Canada, may be entitled, nor can such rights or privileges be affected by the commission, or by the assignment. [*Bruce v. Anderson.*] 127

### BAPTISMS.

See "REGISTERS," 2. 3. 4.

### BILL OF EXCHANGE.

1. The drawer of an inland bill of exchange is *quoad hoc* a merchant, and a *capias ad satisfaciendum* may be had, upon a judgment thereupon obtained against him, under the ordinance 25 Geo. III. c. 2, § 38.—[*Georgen v. Mc Carthy.*].....53
2. The drawer of a bill of exchange is liable to the damages provided by the laws of the country in which it is drawn and to no other. [*Astor v. Barn.*].....69

### BOTTOMRY.

See "INTEREST," 1.

### BURIALS.

See "REGISTERS."

### BYE-LAW.

A stockholder in a joint stock company can bring an action of account against the corporation, and thereby contest the validity of a bye-law made by a board of its directors. [*Keys v. The Quebec Fire Assurance Company.*].....425

### CAPIAS.

In case of any irregularity in suing out a *capias ad respondendum* a motion to discharge the defendant from the sheriff's custody, for want of a sufficient affidavit to hold to bail, and not an exception as

to form, is the mode of taking advantage of such irregularity. [*Barney v. Harris.*] .....52

See "BILL OF EXCHANGE."

### CARRIERS.

1. Several packages of goods were shipped at London to a merchant at Quebec, where upon the arrival of the vessel, and after delivery of the packages it was ascertained that some of the goods were missing from one of the packages. Notice not having been given until several months afterwards, it was thereupon held that the master was not responsible for the deficiency. [*Swinburne v. Massee.*].....569
2. If merchandize, in good order, is entrusted to a carrier, and arrives at its destination, in a damaged state, where he holds it subject to freight, he is liable for the value. And if he pretends that fraud or concealment has been practised, the *onus* of proof lies upon him. [*Hart v. Jones.*].....589
3. The owners of river craft are responsible for losses occasioned by their own want of care, attention or experience, or that of their servants. [*Borne v. Perrault.*].....591

### CERTIFICATE.

See "INSURANCE," 4.

### CERTIORARI.

1. A *certiorari* will lie for excess of jurisdiction and illegality in the proceedings of commissioners appointed by the governor of the province under the ordinance, 31, Geo. III. c. 6. for the building and repairing of churches. [*The King v. Gingras.*].....560
2. In the court of Quarter sessions a defendant makes affidavit of his intention to remove the indictment into the King's bench, because it involved important questions of law, and because certain of the justices were personally interested in the prosecution; thereupon he is ordered to shew cause why an attachment for a contempt against him should not issue; this he declines, but rests his case upon

the prudence and discretion of the court, he is then declared guilty of two contempts, apprehended and imprisoned; held, that a *certiorari* will not lie to remove his conviction. [*Ex parte Vallières De St Réal*]. .....593

## CHURCHES.

See "CERTIORARI," 1.—"PEW."

## CODE MARINE.

The *code marine*, if it even was in force, was no part of the common law of Canada, but a part of the public law, and consequently superseded by the effect of the conquest; and if it was law in the admiralty jurisdiction alone, whether it was public or common, the introduction of the English admiralty law abolished it. [*Baldwin v. Gibbon*]. .....72

## COINS.

1. By the statute 14th, Geo. III. c. 88, duties upon the importation of goods into Lower Canada, are sterling money of Great Britain, and the uniform standard of value at which foreign coins are to be received in payment, is their contents in pure silver, at 5s. 6d. sterling per ounce. [*Gillespie v. Perceval*]. .....365
2. A tender of the Spanish dollar, at 4s. 6d. sterling, the value fixed by the provincial statute 48th, Geo. III. c. 8, for the payment of all debts and demands, is not a legal tender in payment of duties. ....*Id.*
3. The value of the Spanish dollar, in sterling money, is 4s. 4d. [*Gillespie v. Perceval*]. .....*Id.*

## COLLISION.

1. The court of vice admiralty exercises jurisdiction in the case of a vessel injured by collision in the River St. Lawrence, near the city of Quebec. *Howard v. The Camillus*, and *Ritchie v. Orkney*. .....158-613
2. In a cause of collision by one steam vessel against another where the loss was charged to be owing to negligence of the defendants, the court being of opinion that the damage was occasioned by such negligence, pronounced for damages and costs.

*Quære*, whether under certain circumstances one moiety of the aggregate amount of the damage should not be borne by each party. [*Mailand v. Molson*]. .....441

## COMMERCIAL MATTER.

See "EVIDENCE."

## COMMISSIONER.

A contractor for a public building can maintain an action against the commissioners with whom he contracted for the erection of such building, if they have received from government the money which is due to them. [*Larue v. Crawford*]. .....141

## COMPLAINT.

*Complaint* cannot be maintained for a disturbance by entering a pew in a church, by one parishioner against another. [*Anger v. Gingras*]. .....135

## CONSIGNEE.

See "DELIVERY."

## CONTEMPT.

See "TRESPASS," 5, "CERTIORARI," 2.

## CONTRAINTE PAR CORPS.

1. A *contrainte par corps* against a married woman, upon a judgment for principal, interest and costs, cannot be obtained. [*Scott v. Prince*]. .....467
2. The allowance of the *contrainte par corps après les quatre mois* is discretionary with the court. ....470

## CORPORATION.

1. The bequest of a sum of money to trustees, for the benefit of a corporation not *in esse* but in apparent expectancy, is not to be considered a lapsed legacy.
2. A similar bequest, to be applied towards defraying the expense to be incurred in the erection and establishment of a university or college upon condition that the same be erected and established within ten years from the testator's decease, such

condition is accomplished if a corporate and political existence be given to such university or college by letters patent, emanating from the crown, although a building applied to the purposes of such university or college may not have been erected within that period of time. [*Desrivieres v. Richardson*.].....218

3. A devise of real estate to a corporation upon condition that it should, within the period of ten years, *erect and establish, or cause to be erected and established*, upon the said estate, an university or college : held, that the words *erect and establish, &c.* extend only to the erection and establishment of the corporation or body politic, forming the university or college, and not to the erection of a building in which the university or college is to be established. [*The Royal Institution v. Desrivieres*.].....224
4. If a corporation, to be composed of certain trustees to be subsequently named by the crown, be established by statute, the existence of the corporation will commence at the time when the statute was passed and not when the trustees are named.....[*Ib*]
5. The head of a corporation may bind the body corporate by any contract from which it may derive a benefit.....[*Ib*]

### CRIMINAL LAW.

1. The statute 14th, Geo. III. c. 83, has introduced into this province, that portion of the criminal law of England only, which was of universal application there, and not such parts as were merely municipal and of local importance.
2. By that statute the 9th, Geo. I. c. 19, and 6th, Geo. II. c. 35, which impose certain penalties, on persons selling tickets in a foreign lottery, have been made to form a part of the criminal law of Lower Canada. [*Exparte Rouse*.] .....321

### CURATOR.

No action, *en revendication*, can be maintained by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possession by virtue of an *envoi en possession*, or a final

*delivrance* of the estate and succession. [*Gauwin v. Caron*.].....136

### DAMAGES.

See "BILL OF EXCHANGE." 2. "TRESPASS."

### DELIVERY.

1. Merchandize imported from abroad is delivered to the consignee when placed on the wharf, and is from thence at his risk, provided notice of the arrival of his goods has been given to him. [*Rivers v. Duncan*.].....139
2. A mercantile house at Newry directs a house at Quebec to contract for the building of a ship, for which they, the Newry house, would send out the rigging. The Quebec house enter into a contract with some shipbuilders accordingly. The Newry house then direct their correspondent at Liverpool to send out the rigging, he does so ; and it having been actually delivered to the Quebec house : held, that the property in it was vested in the Newry house, and that the Quebec house had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house. [*Rogerson v. Reid*.].....412
3. A sells a quantity of timber to B, a part of the price only to be paid on delivery of the timber. A makes a delivery and B omits to pay any part of the price, thereupon A brings an action to rescind the contract of sale and by process of *saisie revendication* attaches the timber. Held, that this action could be maintained and that the timber so far as it could be identified should be restored to A. [*Moor v. Dyke*.].....538

See "SALE." "FREIGHT." "TIMBER."  
"GOODS."

### DELIVRANCE.

*Le mort saisit le vif*. A common legacy,



therefore, vests in the heir at law, and he is not divested of the same until a *délivrance de legs* has been obtained. [*Campbell v. Shepherd.*].....138

See "PETITORY ACTION," "CURATOR."

### DEVISE.

See "ALIEN," 3. "CORPORATION," 1. 2. 3.

### DUTIES.

By the words "first or sterling cost," in the provincial statute, 53rd, Geo. III. c. 11. imposing duties on the importation of certain goods, is to be understood, the price paid for them at the place from whence they were exported, less the discount.

And an action on the case may be maintained against a collector of the customs who refuses to admit the goods to an entry, until duties, as calculated upon the price of the goods, without a deduction of the discount, have been paid. [*Pater-sons v. Perceval.*].....215

See "TRESPASS," 2. "COINS."

### ENVOI EN POSSESSION.

See "CURATOR."

### EVIDENCE.

1. In a commercial matter, if it appears, in an action of assumpsit, at the trial, that the plaintiff has a partner who was a party to the contract, and is not a party to the suit, the action will be dismissed although the defendant has not pleaded the facts. [*Pozer v. Clapham.*].....122

2. The transactions of tradesmen and artisans in the way of their trade, are to be considered as commercial matters, and in all actions brought upon such transactions, recourse must be had to the English rules of evidence under the ordinance 25th, Geo. III. c. 2. § 10, and generally in all cases, which by the law of France were cognizable by the consular jurisdiction. [*Pozer v. Meiklejohn.*].....122

See "MEMBER OF PARLIAMENT," 1. "RIVERS," 2. "FEES," 3. "NOTARY," 3.

### EXCEPTION.

1. Any irregularity in an affidavit to attach property, cannot be taken advantage of by an exception as to form. [*Barny v. Harris.*].....32
2. Misnomer cannot be pleaded by an exception as to form. [*Jones v. McNally.*].....56

See "CAPIAS," "PLEADING."

### EXECUTORS.

See "WILL," 5.

### FEES.

1. No fee of office can be exacted by a public officer unless established by legislative enactment, or by ancient usage which presupposes the sanction of legislative authority. [*Price v. Perceval.*].....159
2. The action for money had and received will lie for exorbitant fees paid to Custom house officers, and in the name of the owner of a vessel although paid by the master.....*Id.*
3. The Imperial statute 5, Geo. III. c. 45, enacts that where no fees have been established in a colony of Great Britain, the Custom house officers there shall be entitled to receive such fees as were received by the like officers in the nearest port in any British colony before the 29th Sept. 1764, and the court will take notice of the relative geographical positions of countries to ascertain that port. *Id.*

See "NOTICE," "JUDGE," "REGISTERS," 4.

### FIDEJUSSEUR.

A *fidejusseur* has his action against a *co-fidejusseur* for his proportion of the sum which he has paid for their common principal, but if their be no convention to the contrary in the deed by which he became security, his action is only for money paid, and consequently, he can have no mortgage upon the property of the *co-fidejusseur* until he has obtained a judgment, and then only from the date of that judgment. [*Jones v. Laing.*].....125

**FIERI FACIAS.**

See "SHERIFF." 1.

**FORFEITURE.**

See "REGISTERS." 1.

**FREIGHT.**

Goods brought on freight, to be paid at Quebec, on delivery, cannot be removed from the wharf before the freight is paid, and if in good order, they are delivered when placed on the wharf. [*Patterson v. Davidson*]......140

**FUGITIVES.**

The Executive government may deliver up to a foreign state, for trial, any fugitive from justice, charged with having committed any crime within its jurisdiction. [*The case of Joseph Fisher*]......245

**GOODS.**

Goods sold for cash, but not paid for, may be followed and claimed in an action of *revendication*, provided that the action be commenced within eight days after the transaction, and the goods have remained until then in the state in which they were delivered. [*Aylwin v. McNally*]......541

See "DELIVERY," "DUTIES."

**GOVERNOR.**

An action cannot be maintained against a governor of this province while in the administration of the government. [*Harvey v. Lord Aylmer*]......542

**HABEAS CORPUS.**

See "MEMBER OF PARLIAMENT."

**HEIRS.**

To an action against several heirs it is not a valid objection that all of them were not originally made defendants, if in the progress of the suit they have been made parties by an interlocutory judgment of the court. [*Viger v. Pothier*]......394

See "CURATOR," "DELIVRANCE," "PETITORY ACTION," 2, "WILL," 5.

**HYPOTHEC.**

See "LANDS," "FIDEJUSSEUR."

**INCIDENTAL DEMAND.**

If an incidental plaintiff does not, on the face of his declaration, shew that his demand is connected with the demand in chief, the defendant must avail himself of this omission by an exception as to form; if he does not, but answers, he waives the irregularity of the proceedings, and admits that he is *rectus in curia*. [*Turner v. Whitfield*]......46

**INJUNCTION.**

See "MANDAMUS."

**INSURANCE.**

1. Policies of insurance are to be construed by the same rules as other instruments; therefore, where there is an express warranty there is no room for implication of any kind. [*Scott v. the Quebec Fire Assurance Company*]......147
2. Under the clause or condition in policies of insurance, that in case of any dispute between the parties, it shall be referred to arbitration, the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference in the progress of a suit. [*Scott v. the Phoenix Assurance Company*]......152
3. In insurance against fire the insurers pay the whole of any loss which does not exceed the amount insured, although the goods insured be of greater value.— [*Peddie v. the Quebec Fire Assurance Company*]......174
4. If a condition, referred to in a policy of insurance against fire, requires, in the event of loss, and before payment thereof, a certificate to be procured under the hand of a magistrate or sworn notary of the city or district, importing that they are acquainted with the character and circumstances of the persons insured, and do know or verily believe that they have really and by misfortune without fraud, sustained by fire, loss and damage to the

amount therein mentioned, such certificate is a condition precedent to a recovery of any loss, against the insurers, on the policy. And if a certificate be procured, in which a knowledge and belief as to the amount of loss is omitted, it will be insufficient. [*Scott v. the Phoenix Assurance Company.*].....354

### INTEREST.

1. Maritime interest at the rate of £25 per cent, upon a bottomry bond at Quebec, not considered exorbitant interest.— [*White v. the Dædalus.*].....130
2. The Crown can recover interest where a private individual would be entitled to it, as in an action for money paid under a written contract on account of a third person, in which it may be recovered from the date of service of process of the court. [*The King v. Black.*].....324

### INTERLOCUTORY JUDGMENT.

See "RES JUDICATA."

### JUDGE.

The court of K. B. has no jurisdiction in an action against a judge of the court of vice admiralty to recover back money paid to him as fees in a suit determined in that court, but the remedy is by appeal to the high court of admiralty in England, or to the King in his Privy Council.

*Semble*, That the right of the judge of the Vice admiralty, to exact fees, is of an immemorial usage introduced into this country after the conquest. [*Wilson v. Kerr.*].....341

### JUGES CONSULS.

See "EVIDENCE," 2.

### JURISDICTION.

See "TRESPASS," 1, "INSURANCE," 2, "COLLISION," 1, "VICE ADMIRALTY," "JUDGE."

### JURY.

If a party moves for a jury he cannot afterwards reject the verdict on the ground

that the jury ought not to have been allowed, because he, the mover, was not a merchant or trader. [*Rivers v. Duncan.*].....140

### JUSTIFICATION.

See "LIMITATIONS," 3. "ASSAULT."

### LANDS.

A general mortgage or hypothèque does not affect lands held in free and common socage. [*Paterson v. McCallum.*].....423

### LEGACY.

See "DELIVRANCE DE LEGS," "CORPORATION."

### LEGISLATIVE COUNCIL.

The legislative council has a right to commit, as for breach of privilege, in cases of libel,—and the court will not notice any defect in the warrant of commitment for such an offence, after conviction. [*The case of Daniel Tracey.*].....478

### LETTER OF ATTORNEY.

Proof of a letter of attorney, executed *sous seing privé*, is not required where a deed executed by the attorney in virtue thereof, is proved, if the principal, by any subsequent use he has made of the deed, has ratified it.—[*The Royal Institution v. Richardson.*].....224

### LIBEL.

See "TRESPASS," 5. "LEGISLATIVE COUNCIL."

### LIEN.

See "SHIPBUILDER," "DELIVERY," 2.

### LIMITATIONS.

1. The statute of limitations is a good plea to a debt contracted in London without reference, direct or indirect, to the law of another country. [*Hogan v. Wilson.*] 145
2. An action of trespass against a road sur-

veyor,—who had acted under a judgment of the court of Quarter Sessions,—for entering the plaintiff's close and destroying certain buildings, must be brought within three months after the right of action accrued, as provided by the statute 36, Geo. III. cap. 9. § 76.

3. Such action may be maintained against persons, acting under the orders of the road surveyor, who do not plead a justification of their conduct. [*Canon v. La-rue.*].....338

See "NOTICE."

### LITISPENDANCE.

Litispendance in a foreign state is no bar to an action instituted in this province. [*Russel v. Field.*].....558

### LOTTERIES.

See "CRIMINAL LAW," 2.

### MALICIOUS ARREST.

It is not necessary, in Canada, in an action for a malicious arrest of property, to set forth, in the declaration, that the action in which the arrest was made has been terminated. [*Whitfield v. Hamilton.*]...40

### MANDAMUS.

1. The court will not grant a *mandamus* to the sheriff to cause the sale of lands and tenements as directed by the ordinance 25th, Geo. III. c. 33, to be advertized in a newspaper intituled, "The Quebec Gazette," where it is not shewn that there is no other specific legal remedy. [*Ex-parte Neilson.*] .....168
2. Nor will the court grant an injunction to the King's printer enjoining him not to advertize the sale of lands and tenements under the same ordinance.....[*Id.*]

### MARRIAGES.

See "REGISTERS," 2. 3. 4.

### MASONS.

The mason has an especial privilege, in the

nature of a mortgage, upon any building erected by him, and for repairs.

This privilege, however, will not be allowed to the prejudice of other creditors of the proprietor, unless within a year and day there be something specific to shew the nature of the work done, or the amount of the debt due thereon. [*Jour-dain v. Miville.*].....263

### MEMBER OF PARLIAMENT.

1. On a motion for a writ of habeas corpus to produce the body of a person in custody, (under a warrant from three members of the executive council for "treasonable practices,) founded upon his "privilege" as a member of the provincial parliament, two papers purporting to be two indentures of election produced in support of the motion, are not sufficient evidence of his being such member to entitle him to the benefit of the writ.
2. A member of the provincial parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices," and during his confinement elected a member of a new parliament, is not entitled to privilege from such arrest, by reason of his election to either parliament. [*Exparte Bedard.*].....1

### MINOR.

A minor, of the age of twenty, can bequeath personal property to a tutor.— [*Durocher v. Beaubien.*].....307

See "RES JUDICATA."

### MISFEASANCE.

See "TRESPASS, 2. 3.

### MISNOMER.

See "EXCEPTION," 2.

### MONEY HAD AND RECEIVED.

See "FEES," 2.

### MORTMAIN.

1. The declaration of the king of France

- which requires a licence in mortmain, in certain cases, is repealed by the provincial statute 41st, Geo. III. c. 17, so far as respects the Royal Institution for the advancement of learning. [*Desrivieres v. Richardson.*] .....218
2. A licence in mortmain under the declaration of the king of France, of 1743, is not required to enable the Royal Institution for the advancement of learning to accept of a devise of real estate. [*The Royal Institution v. Desrivieres.*] .....224

## MORTGAGE.

See "FIDEJUSSEUR." "MASONS." "LANDS."

## MOVEABLE ESTATE.

See "WILL," 1.

## MUR MITOYEN.

An action, for money paid and advanced, may be maintained by a proprietor of a *mur mitoyen* against his co-proprietor for his proportion of the sum expended in the repairs of the wall, if the latter has impliedly acquiesced in the making of such repairs. [*Latouche v. Rollman.*] .....151

## NOTARY.

1. If a paper writing, contained in a sealed envelope, purporting to contain an holograph will, be opened by a notary public and retained by him after the decease of the testator; such notary cannot keep it on record in his office, but must produce the same before a judge, that probate may be made, and the will is then to remain deposited with the records of the Court of King's bench. [*Grant v. Planté.*] .....60
2. A notary public has no authority to unseal an holograph will unless in the presence and by the order of a judge....[*Ib.*]
3. A notary public cannot be compelled, upon an inscription *en faux*, to give evidence touching the validity of any instrument executed before him. [*Routier v. Robitaille.*] .....440

## NOTICE.

In an action against a collector of the customs, to recover back money exacted by him as fees of office, he is not entitled to one month's notice of action. Nor can he object that such action should have been commenced within three months from the time when such fees were paid. [*Price v. Perceval.*] .....179

See "DELIVERY," 1.

## PARTNERSHIP.

1. The dissolution of a partnership without particular notice to persons with whom it has been in the habit of dealing, and general notice in the Gazette to all with whom it has not, does not exonerate the several members of the partnership from payment of the debts due to third persons not notified and who contracted with any of them, in the name of the firm, either before or after the dissolution. [*Symes v. Sutherland.*] .....49
2. Partnership property is not liable for the debts of any of the partners individually. [*Montgomery v. Gerrard.*] .....437

See "EVIDENCE."

## PARTY WALL.

See "MUR MITOYEN."

## PENALTIES.

See "CRIMINAL LAW," 2.

## PETITORY ACTION.

1. If the declaration, in a petitory action, contain a designation of the land by its name, that of the borough, village, or hamlet, and of the parish where it is situated, these will be sufficient even if the boundaries be incorrectly stated. But if the designation be so far imperfect, that the defendant cannot identify the land, he may plead this fact by an exception as to form. [*The Royal Institution v. Desrivieres.*] .....224
2. To maintain a petitory action against a residuary legatee, a *délivrance de legs*, from the heir at law, is not required, the

Quebec act and the provincial statute 41st, Geo. III. c. 4. § 1, having,—as respects testamentary donations, in cases where the heir at law has been entirely excluded from the succession by will,—abrogated the rule of the French law, *le mort saisit le vif*. *Semble*, that the heir at law only, can avail himself of the exception (if pleaded) that the plaintiff had never obtained *délivrance de son legs*. .....[*lb.*]

## PEW.

The eldest son of the *concessionnaire* of a pew is entitled to have it, upon the remarriage of his father's widow, at the price at which it may then be adjudged to the highest bidder. [*Borne v. Wilson*]. .....133

*See* "COMPLAINTS."

## PLEADING.

An exception to matter pleaded by exception may be filed even under the ordinance 25th, Geo. III. c. 2. § 13. [*Pacquet v. Gaspard*, and *Forbes v. Atkinson*]. .....106-116

## POSTHUMOUS CHILD.

*See* "WILL," 2.

## PREROGATIVE.

Where the greater rights and prerogatives of the crown are in question, recourse must be had to the public law of the empire, by which alone they can be determined; but where its minor prerogatives and interests are in question they must be regulated by the established law of the place where the demand is made. [*The King v. Black*]. .....324

*See* "CODE MARINE." "APPEALS," 2.

## PRESCRIPTION.

1. The prescription of a year, under the custom of *Paris*, does not affect debts due to merchants, which are not barred by a less period than six years. [*Morrough v. Munn*]. .....44
2. On proof of 30 years possession, the party

is not bound to produce a title or to offer any evidence to show that he held *animo domini*, or *de bonne foi* until the contrary is proved by the plaintiff. [*The Seminary of Quebec v. Patterson*]. .....146

*See* "LIMITATIONS."

## PRIVILEGE.

*See* "MEMBER OF PARLIAMENT." "LEGISLATIVE COUNCIL." "SHIP," 2. "MASON'S."

## PROBATE.

*See* "WILL," 1.

## PROHIBITION.

1. A prohibition may issue from the court of King's bench to stay proceedings in the court of Vice admiralty.
2. A suit for salvage of a ship stranded on a sandbank in the River St. Lawrence, the *locus in quo* being *infra corpus comitatus*; held, that the case was not one of admiralty jurisdiction, and a prohibition granted to stay further proceedings therein. [*Hamilton v. Fraser*]. .....21

*See* COLLISION," 1. "VICE ADMIRALTY."

## PROMISSORY NOTE.

In an action of *assumpsit* by the endorsee against the endorser upon a note endorsed for a sum less than that made payable by the note, the plaintiff cannot recover. [*McLeod v. Meek*]. .....456

## PUBLIC LAW.

*See* "CODE MARINE." "PREROGATIVE."

## PUBLIC OFFICER.

Where a person contracts as a public officer, he is not personally responsible, without some peculiar cause to charge him. [*Scott v. Lindsay*]. .....68

*See* "REGISTERS," 2. 3. 4. "FRES," 1. "COMMISSIONER." "TRESPASS," 1.

## PURCHASER.

*See* "SALE."

## QUEBEC.

The River *St. Lawrence*, from the west end of *Anticosti* to the eastern line of the District of *Three Rivers*, is within the District of *Quebec*. [*Hamilton v. Fraser*.].....21

## RATIFICATION.

See "LETTER OF ATTORNEY."

## REGISTERS.

1. Change of master not endorsed on register, and no bond given by new master, according to 26th, Geo. III. 3. c. 60. § 18, and 27th Geo. III. c. 19. § 7, operates a forfeiture. [*Perceval v. The Harrower*.].....80
  2. A dissenting minister of a protestant congregation, not being a public officer, nor a person in public holy orders recognized to be such by law, is not entitled to and cannot keep a pariah register for baptisms, burials, and marriages. [*Esparte Spratt*.].....90
  3. The words "protestant churches or congregations" used in the statute 35th, Geo. III. c. 4, which requires rectors of parishes, &c. from 1st January 1796 to keep two registers, both of which to be authentic, held to embrace only such churches and congregations as had their existence in the province when the statute was passed. [*Spratt v. The King*.].....149
  4. A minister of a presbyterian congregation, in communion with the church of Scotland, is entitled to registers for marriages, baptisms and burials, notwithstanding that in the place where he officiates, another church, also in communion with the church of Scotland, has been previously established under the authority of the government.
- Quære*. As to any right in the minister to fees for entries in such registers. [*Ex parte Clugston*.].....448

## RELATIONSHIP.

The opinions of two members of a court, in the degree of relationship of brothers in law cannot be reckoned as one under an edict of 1681, and a declaration of

the king of France, of 1708. [*Fleming v. The Seminary of Montreal*.].....194

## RES JUDICATA.

An interlocutory judgment adopting, without opposition, the account of a succession prepared by its order, passes in *res judicatam*, and it is not competent to the representatives of a minor who was legally a party to the suit, to revive the proceedings and contest any particular item in the account. The court, however, may rectify any error of calculation. [*Plenderleath v. Mc Gillivray*.].....470

## REVENDICATION.

See "CURATOR," "DELIVERY." 2.3.

## RIVERS.

1. Rivers, whether navigable or not, are vested in the Crown for the public benefit, and no person, *seigneur* or other, can exercise any right over them without a grant from the Crown.
2. In an action of damages, by the stopping of communication on a navigable river with a boom and chain, it appearing from an agreement between the parties, after the commencement of the suit, that the placing of the boom and chain tended to their mutual benefit, the action was dismissed. [*Boissonault v. Oliva*.].....564
3. A seignior, by his grant from the Crown, acquires a right of property in the soil over which a river, not navigable, flows, but in the running water he has only a right of servitude while it passes through or before the land he retains in his possession, which does not authorize him to divert the stream, or use the water to the prejudice of other proprietors above or below him. [*St. Louis v. St. Louis*.].....575
4. An action by a seignior against his co-seignior, for the improper use of the common estate, can be maintained.....16.

See "SERVITUDE."

## SALE.

If property after a sale perfected, is burnt by accident, before delivery, the loss falls

on the purchaser. [*McDouall v. Fraser.*]  
.....101

See "DELIVERY."

### SALVAGE.

See "PROHIBITION," 2, "VICE ADMIRALTY," 1.

### SCELLÉ.

It is essential to the validity of a *scellé*, under the French law, that it be executed by a judge in person and not a ministerial officer of the court, and that the property and papers which are the object of the *scellé* remain under the seal of the court with a guardian to protect them. [*Richardson v. Molson.*].....376

See "ATTACHMENT," 3.

### SEIGNIOR.

See "RIVERS," 4.

### SERVITUDE.

1. The banks of navigable rivers belong to the riparian proprietor subject to a servitude, in favor of the public, for all purposes of public utility. [*Fournier v. Oliva.*].....427
2. Navigable rivers have always been regarded as public highways, and dependencies of the public domain; and floatable rivers are regarded in the same light. In both the public have a legal servitude for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude. [*Oliva v. Boissonnault.*].....524

See "RIVERS."

### SHERIFF.

1. If an application be made to compel the Sheriff to return a writ of *Fieri Facias* before the day fixed for the return in the body of the writ, the court will not grant the application if there be no evidence to shew that the sheriff has actually been

guilty of some neglect or omission. [*Dorval v. L'Espérance.*].....57

2. The sheriff having seized by attachment a large quantity of timber and appointed a single guardian to take charge of the whole, in whose absence, during a sudden storm, a proportion of the timber, not being moored or otherwise secured, went adrift and was lost;—held, that the sheriff was guilty of ordinary neglect and responsible for the loss.

Also, that the sheriff might have employed as many persons as were necessary for the security of the timber, and have demanded of the plaintiff at whose suit the timber was seized, in advance, the sums required for this purpose; and in case of refusal, would have been exonerated from the charge and custody of the timber.— [*McClure v. Shepherd.*].....75

See "ATTACHMENT."

### SHIP.

1. A vessel loaded and ready for sea, can be arrested for a civil debt unconnected with the ship. [*Parant v. Grenier.*] 453
2. A builder's privilege upon a ship, of his own construction, is lost if he delivers her to the owner and suffers her, knowingly, to be sold at public auction to a third person without opposition. [*Baldwin v. Gibbon.*].....78

See "DELIVERY," 2.

### SOUTH SEA.

The 6th Geo. I. cap. 18, commonly called the south sea bubble act, does not extend to the American Colonies.— [*White v. the Dædalus.*].....130

### STATUTE

An act declared by the legislature, generally, to be temporary, has no more than a temporary effect. Yet a temporary act may repeal a permanent statute if the intention of the legislature to effect such a repeal be manifest. [*Chasseur v. Hamel.*].....310

### SURETY.

See "FIDEJUSSEUR."



## TENDER.

See "COINS."

## TIMBER.

Advances in goods, under a written agreement, are made by A, a merchant in Upper Canada, to enable B, a contractor for lumber, to cut and convey to the Quebec market, a quantity of timber upon the conditions,—that as soon as dressed it should be considered as belonging and delivered to A, but conveyed to market at the risk and expense of B. That A should have the sale of the timber, and account to B for any balance remaining, after a deduction of his disbursements and advances, including 10 per cent upon the latter, with a commission of  $2\frac{1}{2}$  per cent upon the sale: held, that after a delivery to A, before it reaches the market, without fraud or collusion with B, the timber could not be attached at the suit of B's creditors in payment of his debts, but the balance, if any, after a sale by A, can alone be arrested in his hands, under the process of the court. [*Vankoughnet v. Maitland.*] .....357

See "DELIVERY," 3. "SHERIFF," 2.

## TRESPASS.

1. An action of trespass,—*d'injure*,—cannot be maintained against an officer who executes a writ issued upon a judgment rendered by an inferior court in a matter over which they had jurisdiction. [*Goudie v. Langlois.*] .....142
2. An action of trespass on the case, for a misfeasance, can be maintained against a collector of the customs for exacting a larger sum for duties than the law authorizes, unless some reasonable ground of excuse for his conduct is shewn, or such facts be laid before the court as will exclude every imputation of malice or wilful intent. [*Perceval v. Patersons.*]...270
3. If the declaration, in this action, contain a statement of all the material facts, it will be sufficient.....[*Ib.*]
4. Where special damage is the gist of the action, and it be not alleged, or if alleged, be not proved, the action must be dismissed. But where the law gives a

right of action for an injury, it presumes that damages are the consequence, and a conclusion for general damages will be sufficient.....[*Ib.*]

5. In an action of trespass for assault and imprisonment, against the provincial judge of the inferior district of *St. Francis* for issuing process of attachment for contempt against the editor and printer of a public newspaper, for publishing therein certain papers:—held, that as the acts complained of were performed by the judge in his judicial capacity the court could not take cognizance of them and therefore had no jurisdiction. [*Dickerson v. Fletcher.*].....276
6. An action will not lie against a judge for any act done by him within the extent of his jurisdiction. [*Gugy v. Kerr.*]...292

## TRUSTEES.

See "CORPORATION," 1. 2. 4. "WILL," 3.

## TUTOR.

See "MINOR."

## USURY.

See "PROMISSORY NOTE"

## VICE ADMIRALTY.

1. Jurisdiction with respect to suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to his majesty's service at sea, salvage and droits of the Admiralty.....39
2. Under the words "court of session having jurisdiction in the port or place at which a ship shall arrive," contained in the 57th, Geo. III. c. 10. § 8. The court of vice admiralty claims jurisdiction in proceedings for penalties and forfeitures under that act. [*Wilson v. Norris.*]...163

See "PROHIBITION." "JUDGE." "COLLISION," 1.

## WARRANTY.

See "INSURANCE," 1.

WILL.

1. An holograph will of personal and moveable property is valid, by the law of England, and probate may be made thereof according to the provincial statute, 41st, Geo. III. c. 4. [*Grant v. Planté*.].....60
2. The birth of a posthumous child revokes the will of its father partially.....103
3. The condition of a devise to the Royal Institution for the advancement of learning, that it should, within ten years, cause to be erected and established an university or college, bearing the testator's name, is accomplished, if a university of royal and not of private foundation, be erected and established within that period. [*The Royal Institution v. Desri- vières*.].....224
4. It is essential to the validity of a devise of real estate that the *holographe* will, in which it is contained, should be entirely written by the testator, and closed by his signature. [*Caldwell and The King*.] .....327
5. A testator, at the time of his decease, possessed of property belonging to the succession of his wife, deceased, by an holograph will bequeaths all the property of which he might die seized to his heirs and legatees, who were also his wife's heirs, under the penalty, if any of them contested his will, that their share in his succession should be forfeited. He names two executors or trustees, and the survivor of them, for the administration of all his property until a partition. In the making of such partition he directs his executors to act for some of the legatees

who were minors, and for another who was married,—without the authority of her husband for that purpose being requisite,—and whose share they should administer during the husband's life paying her the rents, &c. :—held, that the will is valid, but that its dispositions can be carried into effect only so far as they affect the succession of the testator, and that they could not in any manner apply to the succession of the testator's wife of which his legatees were the heirs, and of which they were, in law, seized from the day of her death, and that one of the executors having renounced the execution of the will the other had *saisine* of the testator's succession to carry his will into effect. [*Viger v. Pothier*.].....394

6. The Quebec act having provided, that every owner of lands, goods or credits, who has a right to alienate the said lands, goods or chattels in his or her lifetime, may devise or bequeath the same, at his or her death, by his or her last will and testament, such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England. Held, that a will, invalid according to the French law, and not executed according to the provisions of the statute of frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England. [*Meiklejohn v. The King and Caldwell*.] .....581

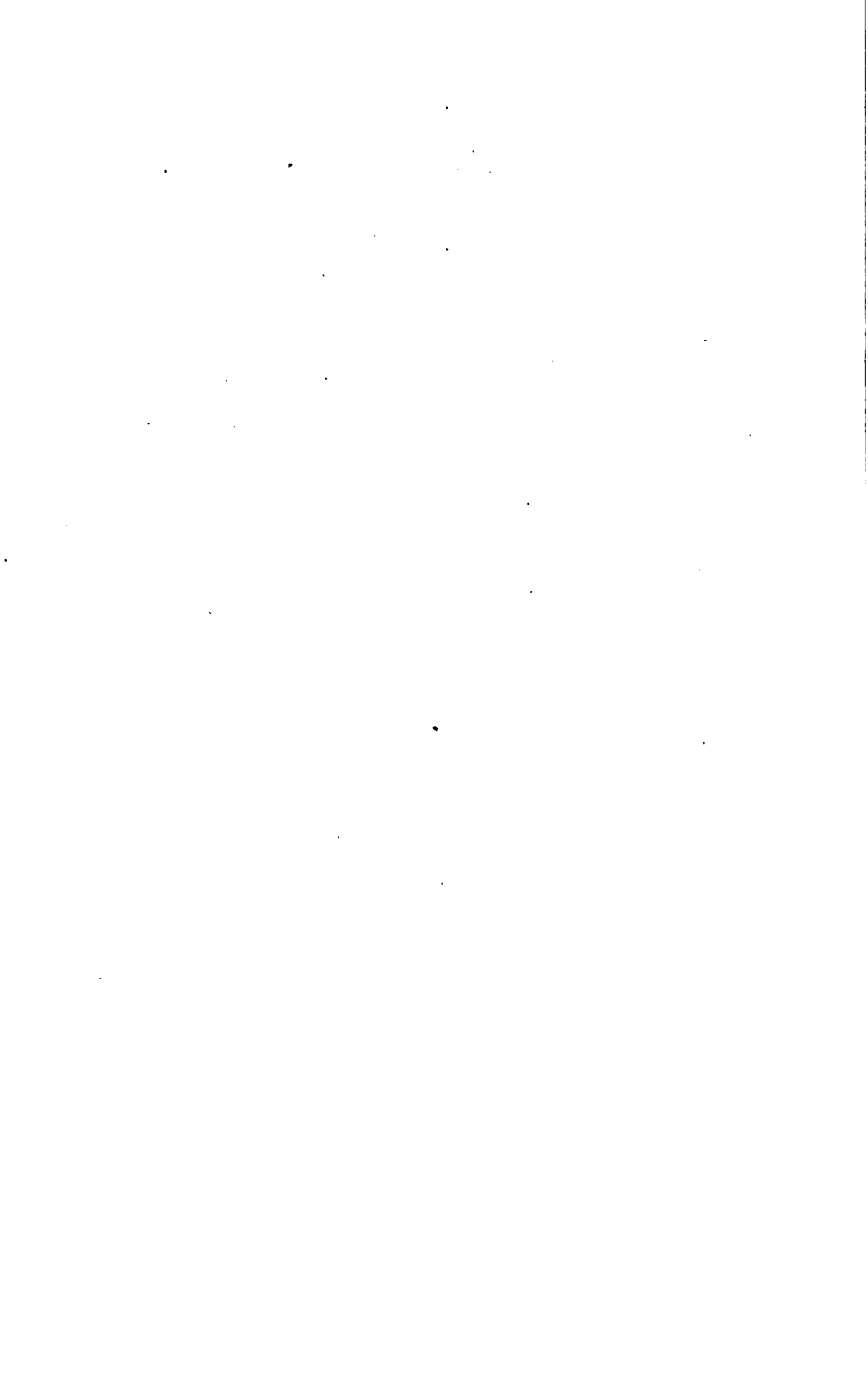
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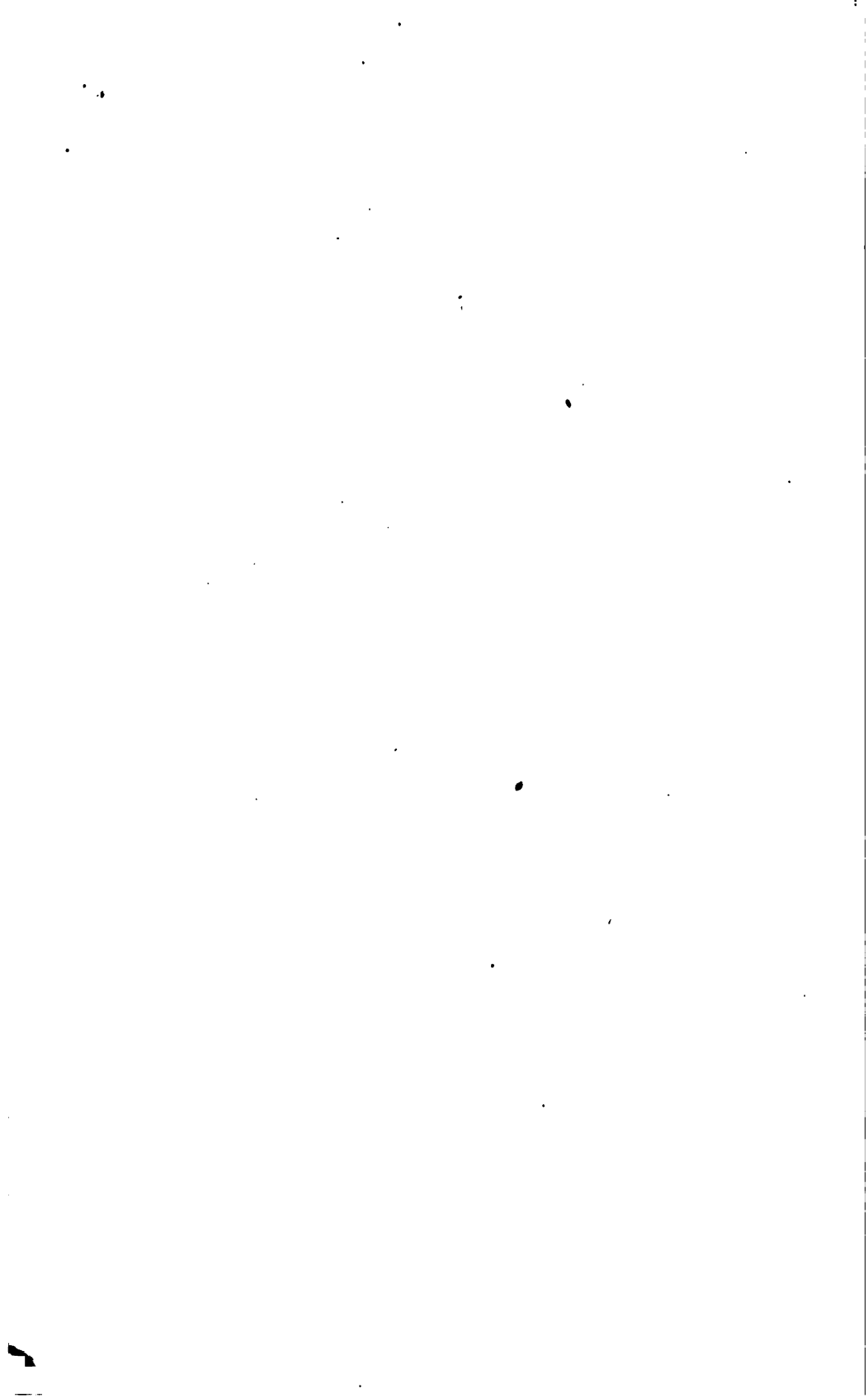
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